95-951

Supreme Court, U.S.
FILED
DEC 1995
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

LESLIE U. HARRIS, On Behalf Of Himself and All Others Similarly Situated,

Petitioner,

vs.

CHASE MANHATTAN BANK, N.A., and DOES 1 THROUGH 50,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

MILBERG WEISS BERSHAD HYNES & LERACH
LEONARD B. SIMON
Counsel of Record
ALAN MANSFIELD
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD HYNES & LERACH
KEVIN P. RODDY
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. As a matter of federal law, does the statutory phrase "interest at the rate allowed by the laws of the State . . . where the bank is located," contained in 12 U.S.C. §85, include contingent, sum-certain penalty charges in the form of late payment fees so as to preempt California's statutory limitations on the form or amount of contractual liquidated damages on revolving credit accounts?

2. May Congress constitutionally delegate to Delaware the power to define the federal term "interest" for all fifty States so as to preempt other States' contract and consumer protection laws?

3. Did Congress intend Delaware's legislative definition of "interest," as set forth in Del. Code Ann. tit. 5, §§945 and 950, to define the federal term "interest" in §30 of the National Bank Act, enacted by Congress in 1864 and now codified at 12 U.S.C. §85, and thereby displace California's contract and consumer protection laws limiting the form or amount of liquidated damages for late payments on revolving credit accounts?

PARTIES TO THE PROCEEDING

Petitioner, who was plaintiff and appellant in the court below, is Leslie U. Harris, a resident of San Francisco, California. Respondent, who was defendant and respondent in the courts below, is Chase Manhattan Bank, N.A., a federally insured state chartered bank located in Delaware.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
A. Introduction	6
B. Background Facts	8
C. Proceedings In The Courts Below	9
REASONS FOR GRANTING THE WRIT	11
ARGUMENT	13
D. The Decision Of The Court Below Conflicts With The Recent Decision Of The Supreme Court Of New Jersey In *Sherman* On The Same Federal Issues	13
1. Introduction	13
2. The Statutory Language And Legislative History Of The National Banking Act Does Not Support The Expansive Reading Of The Term "Interest" Offered By The Court Below	14
3. The So-Called "Most-Favored-Lender" Doctrine Does Not Allow The Exportation Of Late Payment Fees	18

TABLE OF CONTENTS – Continued

Page

4. Section 521's Language And Legislative History Supports The Conclusion That Preemption Of State Credit Card Regulation Is Confined To Traditional Numerical Interest Rates 20

5. The First Circuit's Decision In *Greenwood Trust*, Which The Court Below Followed In This Case, Does Not Support The Notion That The Federal Statutory Term "Interest" Includes Late Payment Fees 23

6. Interpretive Rulings Of The Office Of The Controller Of The Currency Concerning The Meaning Of "Interest" Are Not Entitled To Deference In This Case 24

7. The Bank's Late Payment Fees Are Impermissible Under California Law 25

E. The Decision Of The Court Below Wrongly Applied A Presumption Against Preemption, Rather Than The Proper Standard 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) 27

Arizona v. Roberson, 486 U.S. 675 (1988) 14

Barbour v. Handlos Real Estate & Bldg. Corp., 152 Mich. App. 174, 393 N.W.2d 581 (1986) 17

Blum v. Stenson, 465 U.S. 886 (1984)..... 16

Cipollone v. Liggett Group, 505 U.S. 504 (1992).....26, 29

Copeland v. MBNA America Bank, N.A., No. 94SC409 1995 Colo. LEXIS 743 (Nov. 20, 1995) 13, 17

Copeland v. MBNA America, N.A., 820 F. Supp. 537 (D. Colo. 1993)..... 15

General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990)..... 27

Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 974 (1993) ..... *passim*

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994)..... 2

Harris v. Chase Manhattan Bank, 1995 Cal. LEXIS 1094, 38 Cal. Rptr. 2d 346, 889 P.2d 540 (1995)..... 2

Harris v. Chase Manhattan Bank, N.A., No. S044161, 1995 Cal. LEXIS 6762 (Nov. 2, 1995) 2

Hunter v. Greenwood Trust Co., No. A-103-94, 1995 N.J. LEXIS 1354 (Nov. 28, 1995)..... *passim*

In re Citibank Credit Card Litig., 439 Pa. Super. 79, 653 A.2d 39, *appeal granted*, 659 A.2d 984 (1995) 14

TABLE OF AUTHORITIES – Continued

Page

In re Consolidated Credit Card Appeals, Nos. 94-3203/04, 94-3215/16/17/18 (3d Cir. pending) 14

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 26-27

Lloyd v. Scott, 29 U.S. (4 Pet.) 205 (1830) 16

Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) 18, 19, 20

Maryland v. Louisiana, 451 U.S. 725 (1981) 26

Mazaika v. Bank One, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994), *appeal granted*, 659 A.2d 557 (1995) 14, 15

McClellan v. Chipman, 164 U.S. 347 (1896) 27, 28, 29

National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1870) 28

National State Bank v. Long, 630 F.2d 981 (3d Cir. 1980) 28

Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503 (1985) 28

Rangen, Inc. v. Valley Trout Farms, 104 Idaho 284, 658 P.2d 955 (1983) 17

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) .. 26, 29

Sherman v. Citibank N.A., No. A-102-94, 1995 N.J. LEXIS 1355 (Nov. 28, 1995) ..... *passim*

Smiley v. Citibank (S.D.), N.A., 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for certiorari filed* (Nov. 30, 1995) ..... *passim*

Spain v. Hamilton's Administrator, 68 U.S. (1 Wall.) 604 (1864) 16

TABLE OF AUTHORITIES – Continued

Page

Tackett v. First Sav. of Arkansas, F.A., 306 Ark. 15, 810 S.W.2d 927 (1991) 17

Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1874) 18

Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) 16

United States v. Bass, 404 U.S. 336 (1971) 26

United States v. Turkette, 452 U.S. 576 (1981) 16

Veazie Bank v. Fenno, 75 U.S. 533 (1869) 17

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 13-14

STATUTES, RULES AND REGULATIONS

12 U.S.C.

§85 ..... *passim*

§86 4

§1831d(a) ..... *passim*

28 U.S.C.

§1257(a) 2

California Civil Code

§1671 .....4, 9

§1671(b)-(d) 4-5

Delaware Code Annotated

Title 5, §945 .....5-6, 10

Title 5, §950 .....6, 10

TABLE OF AUTHORITIES – Continued

Page

U.S. Constitution

Article I, §1 3

Article VI, §1 3

Article VI, cl. 2 3

SECONDARY AUTHORITIES

Russ Bleemer, *Court May Chip Away Credit-Card Late Fees*, N.J.L.J. (Feb. 20, 1995) 7

Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶15.09[2][c] 7

Robert A. Burgess & Monica A. Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929, 936 (1987) 7

William S. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 Bus. Law. 1079 (1982) 21

Credit Card News (April 1, 1994) 7

Darrell L. Dreher, Hugh M. Hayden & Michael C. Tomkies, *Survey: Consumer Financial Services Law - Developments in the Interstate Delivery of Consumer Financial Services*, 50 Bus. Law. 1093 (1995) 7

Douglas Ginsburg, *Interstate Banking*, 9 Hofstra L. Rev. 1133 (1981) 12

General Accounting Office, *U.S. Credit Card Industry: Competitive Developments Need to Be Closely Monitored* (April 1994) 7

TABLE OF AUTHORITIES – Continued

Page

Inter. Letter 452, Fed. Banking L. Rep. (CCH) ¶85, 676 (Aug. 11, 1988) 24

Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 Stan. L. Rev. 687 (1980) 27

Michael C. Tomkies, *Interstate Consumer Credit Transactions: Card Issuers Win Fee Exportation Cases*, 47 Consumer Fin. L.Q. Rep. 105 (1993) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner, Leslie U. Harris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division Two, as affirmed by the Supreme Court of California, which held in this case that the lawfulness of loan charges made by Respondent, Chase Manhattan Bank, N.A. ("Chase" or the "Bank"), a federally insured state chartered bank, has been entrusted to Delaware, the Bank's home state, so that Delaware law operates to preempt any and all conflicting California contract and consumer protection laws imposing limitations on liquidated damages that may be charged on credit cards held by California residents.

As set forth herein, the decision of the court below, which was affirmed by the Supreme Court of California, conflicts with the decision of the Supreme Court of New Jersey in *Sherman v. Citibank N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (Nov. 28, 1995), and its companion case, *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (Nov. 28, 1995). In *Sherman*, the New Jersey court held that late payment fees are not "interest" within the intent and purpose of the National Bank Act and that the statutory phrase "interest at a rate allowed by the laws of the State . . . where the bank is located," 12 U.S.C. §85, refers *only* to the periodic percentage rate charged on outstanding balances. *Sherman*, 1995 N.J. LEXIS 1355, at *14. Thus, not only was this case wrongly decided in the courts below, but there is a disagreement among the state supreme courts on the issue.

OPINIONS BELOW

The decision of the California Court of Appeal, which is reported as *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), is reproduced in the Appendix. A-20 to A-32. The orders of the Supreme Court of California granting review of the Court of Appeal's decision and then dismissing review, which are not published, are also reproduced in the Appendix, *see* A-33 to A-34, along with the unpublished order of the Superior Court of the City and County of San Francisco sustaining Chase's demurrer to Petitioner's amended complaint, *see* A-18 to A-20 (order); A-1 to A-17 (complaint).[1]

JURISDICTION

The Supreme Court of California entered its judgment in this case on November 2, 1995. A-34. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

[1] On February 23, 1995, the Supreme Court of California, acting on its own motion, ordered review of the California Court of Appeal's decision in this case. *Harris v. Chase Manhattan Bank*, 1995 Cal. LEXIS 1094, 38 Cal. Rptr. 2d 346, 889 P.2d 540 (1995). *See* A-33. On November 2, 1995, following the issuance of its decision in *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for certiorari filed* (Nov. 30, 1995), the Supreme Court of California dismissed review. *Harris v. Chase Manhattan Bank, N.A.*, No. S044161, 1995 Cal. LEXIS 6762 (Nov. 2, 1995). *See* A-34.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1, of the United States Constitution states in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, §1.

The Supremacy Clause provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Full Faith and Credit Clause requires, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1.

Section 30 of the National Bank Act, which is codified as 12 U.S.C. §85 (hereinafter "§85"), provides in pertinent part:

> Any [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at the rate allowed by the laws of the State . . . where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever

> may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title.

12 U.S.C. §85 (emphasis added). Prior to codification, §30 of the National Bank Act also provided what is now codified, in pertinent part, in 12 U.S.C. §86:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action on debt, twice the amount of the interest thus paid. . . .

12 U.S.C. §86.

Section 1671 of the California Civil Code states in pertinent part:

> (b) Except as provided in subsection (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.
>
> (c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the

> liquidated damages are sought to be recovered from either:
>
> (1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or
>
> (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.
>
> (d) In the cases described in subdivision (c), a provision in the contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Cal. Civ. Code §1671(b)-(d).

Section 945 of Title 5 of the Delaware Code, entitled "Interest charges," provides in pertinent part:

> In addition to or in lieu of interest at a periodic percentage rate or rates . . . , a bank may, if the agreement governing the revolving credit plan so provides, charge and collect, as interest, in such manner or form as the plan may provide, 1 or more of the following:
>
> (1) A daily, weekly, monthly, annual or other periodic charge in such amount or amounts as the agreement may provide for the privileges made available to the borrower under the plan;

> (2) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase or loan under the plan;
>
> (3) A minimum charge for each daily, weekly, monthly, annual or other scheduled billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan. . . .

Del. Code Ann. tit. 5, §945. Section 950 of Title 5 of the Delaware Code, which is entitled "Delinquent installments," provides in pertinent part:

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default; provided, however, that no more than 1 such late or delinquency charge may be imposed in respect of any single such installment payment or portion thereof regardless of the period during which it remains in default. . . .

Del. Code Ann. tit. 5, §950.

STATEMENT OF THE CASE

A. Introduction

This Petition raises important constitutional and public policy issues concerning the scope of federal preemption in the areas of contract and consumer protection law affecting many thousands of California residents (as well as residents of many other states) who use credit or

charge cards and who are periodically charged late payment fees amounting to well over $1 billion annually.[2] The California courts erroneously held in this case that the law of Delaware – Chase's home state – provides the definition of the federal term "interest" in §85 of the National Bank Act, 12 U.S.C. §85, and preempts California statutory and common law of contracts and consumer regulation governing the amount of liquidated damages chargeable for late payment on a credit card contract held by a California consumer.

As set forth herein, the decision of the courts below (and other decisions which have reached the same result)[3] impermissibly reverse this Court's presumption

---

[2] According to one expert, who cited a banking industry estimate, credit card issuers collect about $1.5 billion in late payment fees annually, over and above interest charges. *See* Russ Bleemer, *Court May Chip Away Credit-Card Late Fees*, N.J.L.J., Feb. 20, 1995, at 4. Similarly, one industry source reports that late payment charges exacted by credit card-issuing banks totaled almost $2 billion in 1992. *See Credit Card News*, April 1, 1994, at 2; *see also Smiley*, 900 P.2d at 716 (Arabian, J., dissenting) (citing industry reports); General Accounting Office, *U.S. Credit Card Industry: Competitive Developments Need to Be Closely Monitored* (April 1994); Robert A. Burgess & Monica A. Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929, 936 (1987).

[3] *See, e.g., Smiley*, 900 P.2d at 702 (collecting federal and state court decisions); *see also* Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶15.09[2][c], at 15-56 to 15-61 (Rev. ed. 1995) (same); Darrell L. Dreher, Hugh M. Hayden & Michael C. Tomkies, *Survey: Consumer Financial Services Law – Developments in the Interstate Delivery of Consumer Financial Services*, 50 Bus. Law. 1093 (1995); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Card Issuers Win Fee Exportation Cases*, 47 Consumer Fin. L.Q. Rep. 105 (1993).

against preemption. Even though recognizing that there were no clear statements in §85 of the National Banking Act – or its legislative history – of Congressional intent to preempt state regulation of liquidated damages on revolving credit accounts, nevertheless the courts below improperly held that Congress *intended* to preempt state law in this instance. As a result, Delaware law, which improperly expands the definition of the federal statutory term "interest," preempts without limitation the contract and consumer protection laws of the other states. The result in this case is one that ignores not only an unambiguous statutory text and a clear legislative history but what is perhaps the most prominent feature of U.S. banking since the National Banking Act was enacted during the War Between the States – the dual banking system, under which Congress has historically deferred to the interests of the individual states (here California) in the regulation of national banks as to all matters except those essential to their role as instrumentalities of the federal government.

B. Background Facts

The facts of this case are, in the words of the court below, "simple and undisputed." A-21. Chase, which has been a federally insured state chartered bank located in Delaware since June 21, 1990, issues Visa and MasterCard credit cards from Delaware to consumers all over the U.S., including Petitioner, who resides in San Francisco. Under the Bank's cardholder agreement, in addition to interest charged at an annual percentage rate, Petitioner must make a minimum payment by the due date shown on the periodic statement which he receives from Chase.

If the cardholder fails to make such payment by the due date, Chase charges a $10.00 late payment fee regardless of the outstanding balance, the amount of the payment owed, or the actual number of days the payment is late. On February 20, 1992, the Bank assessed such a late payment fee to Petitioner's account. A-21.

C. Proceedings In The Courts Below

Petitioner responded by filing this class action lawsuit in the Superior Court of the City and County and San Francisco asserting various California state law claims and seeking damages and injunctive relief. In an amended complaint, Petitioner alleged that the late payment fee imposed by Chase constituted a liquidated damages penalty in violation of §1671 of the California Civil Code, an unlawful, fraudulent, or unfair business act or practice, a breach of the duty of good faith and fair dealing, fraud and deceit and a breach of contract. A-1; A-17 to A-21. The gravamen of Petitioner's action was that the credit card late payment fee charged by the Bank violates California law because it is in the nature of a penalty or liquidated damages for breach of the credit card agreement, having no relation to the actual damages incurred by Chase as a proximate result of such breach. A-22.

Chase demurred to Petitioner's amended complaint on federal preemption grounds. Relying on the First Circuit's decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 974 (1993), Chase argued that under Delaware law, the state where it is "located," 12 U.S.C. §85, the subject late

payment fee fits within the definition of "interest," set forth in Del. Code Ann. tit. 5, §§945, 950. A-21 to A-22. Sustaining Chase's demurrer, the Superior Court held that Petitioner's California state law action against the Bank was preempted by §85 of the National Banking Act and §521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. §1831d(a), and dismissed Petitioner's amended complaint without leave to amend. A-18 to A-19.

On appeal, the California Court of Appeal affirmed. Agreeing with Chase that under the law of the Bank's home state of Delaware the subject late payment fee fits within the statutory definition of "interest," the court below stated the question presented as whether "Chase may 'export' Delaware's law applicable to late fees, even though it may conflict with California law governing liquidated damage penalties." A-22. Agreeing with the reasoning expressed by the First Circuit in *Greenwood Trust*, 971 F.2d at 823-29, the Court of Appeal held that either §85 of the National Banking Act or §521 of DIDA "preempt contrary state laws regulating late charges and other flat fees in connection with credit card lending." A-25 (citations omitted). Thus, in the words of the California Court of Appeal:

> We conclude that because Chase is chartered in Delaware, [§]521 [of the DIDA] and the supremacy clause mandate that Delaware rather than California law controls its imposition of late charges on [Petitioner's] credit card account. The trial court thus correctly determined that [Petitioner's amended] complaint based on Chase's alleged violation of California restrictions on such charges, is preempted.

A-32. As noted above (*see* note 1, *supra*), the Supreme Court of California initially granted review of this case, but California's highest court dismissed review herein. A-33 to A-34.

REASONS FOR GRANTING THE WRIT

This Court should review and reverse the decision of the court below because (1) it conflicts with the recent decisions of the Supreme Court of New Jersey in *Sherman*, 1995 N.J. LEXIS 1355, and its companion case, *Hunter*, 1995 N.J. LEXIS 1354, which held that late payment fees are not "interest" within the statutory language, legislative intent and purpose of the National Banking Act, 12 U.S.C. §85; (2) it ignores the presumption against preemption established by this Court a century ago and endorses a form of supremacy by one state (Delaware) over other states (including California); and (3) it has an immediate and irrevocable impact upon many thousands of consumers, as well as the 50 states and the national banks.[4]

---

[4] The conflicts between the states and the impact upon consumers resulting from the result in this case cannot be overemphasized. As dissenting Justice Arabian of the Supreme Court of California recently wrote:

> The setting of *non*-interest-rate credit card terms – like the late payment penalties charged California credit card users by out-of-state national banks at issue in this case – is a matter appropriate for regulation by the California legislature. It is not one to be determined by the legislatures of a handful of small or sparsely populated states that have deregulated

As set forth in the following section, this Petition should also be granted because the reasoning of the California courts in this case is flawed and reaches the wrong conclusion for the following reasons elucidated by the Supreme Court of New Jersey in *Sherman*: (1) the statutory language and legislative history of §85 of the National Banking Act does not support the expansive reading of the term "interest" reached in this case; (2) the so-called "most-favored-lender" doctrine relied on by the California courts does not allow the exportation of late payment fees; (3) the language and legislative history of §521 of DIDA actually support the conclusion that preemption of state law credit card regulation is confined to traditional numerical interest rates; (4) the First Circuit's decision in *Greenwood Trust* does not support the notion that the federal statutory term "interest" includes late

---

> consumer credit in an attempt to attract the interstate credit card operations of large national banks.

Smiley, 900 P.2d at 708 (Arabian, J., dissenting) (emphasis in original; footnote omitted). Justice Arabian also quoted Judge Ginsburg on this important point:

> "We have already seen Citicorp relocating some of its retail operations in South Dakota, and the Chase Manhattan and Morgan Banks undertaking similar moves to Delaware. . . . In return for jobs and taxes, these jurisdictions have traded local entry rights and powers, but in each case their real purpose is to serve as a base state for [national] retail banking: the national charter enables the banks to extend credit to residents of other states at their new 'home' state interest rates, and newly provided state laws make these interest rates unlimited."

Id. at 708 n.1 (Arabian, J., dissenting) (quoting Douglas Ginsburg, *Interstate Banking*, 9 Hofstra L. Rev. 1133, 1370 (1981)).

payment fees; (5) interpretive rulings of the federal Office of the Controller of the Currency concerning the meaning of "interest" are not entitled to deference in this case; and (6) Chase's late payment fees are impermissible under California law.

ARGUMENT

D. The Decision Of The Court Below Conflicts With The Recent Decision Of The Supreme Court Of New Jersey In *Sherman* On The Same Federal Issues

1. Introduction

In every significant aspect, the decision of the Supreme Court of New Jersey in *Sherman* conflicts with the decision of the California courts in this case. Moreover, *Sherman* conflicts with the First Circuit's decision in *Greenwood Trust*, thereby further compelling this Court to grant this Petition in order to resolve a growing split in federal and state court precedent on an important legal issue.[5] *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (granting

[5] In *Sherman*, 1995 N.J. LEXIS 1355, at *35, the Supreme Court of New Jersey refused to follow and specifically criticized the recent decision of the Supreme Court of California in *Smiley*. In *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Nov. 20, 1995), the Colorado Supreme Court seemingly followed California's lead and held that Colorado law was preempted by Delaware law, the law of the bank's home state. *Id.* at *5-*6. On the other hand, Pennsylvania's intermediate appellate court has ruled in favor of credit card holders in two cases, finding that there was no preemption of state law.

certiorari in parallel federal and state cases to resolve conflict between state and federal courts over interpretation and implementation of Indian treaty fishing rights); *Arizona v. Roberson*, 486 U.S. 675 (1988) (same – conflict between state court decisions).

In at least six significant aspects, the decision of the California courts in this case conflicts with the decision of the Supreme Court of New Jersey in *Sherman*, thereby compelling review by this Court of the important issues presented herein.

2. The Statutory Language And Legislative History Of The National Banking Act Does Not Support The Expansive Reading Of The Term "Interest" Offered By The Court Below

Starting with the slender reed of legislative purpose that "[t]he intent of [§]85 [of the National Banking Act] was to protect national banks from discriminatory state banking laws and insure ' "competitive equality" ' between state and national banks," A-23 (quoting *Greenwood Trust*, 971 F.2d at 826 n.6), the court below bootstrapped the conclusion that "[v]iewed from [a] historical

---

See Mazaika v. Bank One, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994) (en banc), *appeal granted*, 659 A.2d 557 (1995); *In re Citibank Credit Card Litig.*, 439 Pa. Super. 79, 653 A.2d 39, *appeal granted*, 659 A.2d 984 (1995). As indicated, the Pennsylvania Supreme Court has granted discretionary review in both cases. In addition, an appeal embracing many of these issues is pending before the Third Circuit, having been argued before a panel of that court on February 2, 1995. *See In re Consolidated Credit Card Appeals*, Nos. 94-3203/04, 94-3215/16/17/18 (3d Cir. pending).

perspective, Congress's intent to define 'interest' in the broadest sense for preemption purposes could not be more clear." A-27. This distorted reading of precise federal statutory language and clear legislative history cannot be squared with reality or precedent.[6]

"On its face," as the New Jersey court stated in *Sherman*, 1995 N.J. LEXIS 1355, at *17, §85 of the National Banking Act immunizes national banks that lend money beyond their home state's borders from local usury laws that might give local banks a competitive advantage. However, "neither the plain meaning of the terms 'rate' and 'interest' in [§]85, nor the legislative history of that provision, indicates that these terms carry the expansive meaning inferred by Citibank" in that case, or by the court below and Chase in this case. *Id.* at *18 (citing *Smiley*, 900 P.2d at 717) (George, J., dissenting).[7] As a

---

[6] *See, e.g., Copeland v. MBNA America, N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993) ("[A] proposition that is not obvious from the plain meaning of a statute's language, nor from its legislative history, simply cannot be regarded as a clear manifestation of congressional intent."); *Mazaika*, 653 A.2d at 647 ("[W]e are simply unable to find that Congress, when it used the phrase 'interest at the rate' in enacting [§]85 of the National Banking Act, intended anything other than the ordinary and popular meaning of the word 'interest', which a person of average intelligence and experience would understand.") (footnote omitted).

[7] As Justice George of the Supreme Court of California elaborated in his dissenting opinion in *Smiley*, "[t]here is absolutely nothing in [§]85 that suggests that Congress, when it enacted this provision in 1864, intended the statutory reference to 'interest' to include" late payment fees; indeed, at the time of the 1864 enactment, this Court's decisions on the subject "made it quite clear that such a late payment charge, whose payment was contingent upon the borrower's own conduct during the

result, the New Jersey court clearly (and correctly) disagreed with the result reached by the court below in this case.

This result reached by the Supreme Court of New Jersey in *Sherman* is dictated by well-established rules of federal statutory interpretation which the California courts ignored. First, this Court looks at the statutory language itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where the language is clear and certain, the statute should be construed as written, because the function of the court, in such a case, is to enforce the statute according to its terms. *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979). Where, however, the statutory language is ambiguous or unclear, resorting to legislative history is appropriate in order to arrive at an interpretation that effectuates legislative intent. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

It is undisputed that §85 of the National Banking Act does not provide a definition for the term "interest" or "interest at the rate." 12 U.S.C. §85. *See Smiley*, 900 P.2d at 697 ("We cannot find the meaning of the term 'interest' in [§]85 itself. The provision simply does not define the word.") (citations omitted).[8] Similarly, the legislative history of the National Banking Act, which indicates only

---

term of the loan, would not be considered interest for the purpose of determining whether the loan exceeded the legally permitted rate of interest." 900 P.2d at 718 (George, J., dissenting) (citing *Spain v. Hamilton's Administrator*, 68 U.S. (1 Wall.) 604, 626 (1864), and *Lloyd v. Scott*, 29 U.S. (4 Pet.) 205, 226 (1830)).

[8] As dissenting Justice George of the Supreme Court of California concurred with the majority in *Smiley*, "Section 85 includes no special definition of the term 'interest' as used in the

that the statute's purpose was to create a centralized federal national banking system which would facilitate interstate commerce by issuing a reliable form of currency, *see Veazie Bank v. Fenno*, 75 U.S. 533, 536-39 (1869), does not directly address whether late payment fees are a form of "interest." *See Smiley*, 900 F.2d at 699; *Copeland*, 1995 Colo. LEXIS 743, at *10. Thus, in the recent words of Justice Arabian of the Supreme Court of California, "there is not a particle of textual or legislative evidence to support" the notion that when it enacted the National Banking Act, Congress had in mind not only "interest" in its popular sense – a sum charged for the lending of money, calculated at a periodic percentage over time, that is, rates of interest – but non-interest-rate credit terms such as late payment fees. *Smiley*, 900 P.2d at 709 (Arabian, J., dissenting).

In this case, however, the court below ignored the clarity of the federal statutory language and the true meaning of its legislative history in ascribing to the Congress of 1864 a broad construction of the term "interest"

---

statute, and no indication that the term was used in other than its ordinary and commonly understood sense." 900 P.2d at 717 (George, J., dissenting). Thus, as numerous cases have recognized, "a late payment charge that is set at a fixed-dollar amount unrelated either to the amount of the loan or the time period for which funds are advanced, and that is assessed only if the borrower fails timely to make a required payment, ordinarily is not considered 'interest.' " *Id.* (citing *Tackett v. First Sav. of Arkansas, F.A.*, 306 Ark. 15, 810 S.W.2d 927, 931-32 (1991); *Rangen, Inc. v. Valley Trout Farms*, 104 Idaho 284, 658 P.2d 955, 957-60 (1983); *Barbour v. Handlos Real Estate & Bldg. Corp.*, 152 Mich. App. 174, 393 N.W.2d 581, 587 (1986) ($15.00 late payment fee "do[es] not constitute interest")).

that cannot be justified. The recent decision of the Supreme Court of New Jersey in *Sherman* has highlighted the gross errors evident in the cursory analysis undertaken by the California courts and the result in this case compels review by this Court.

3. The So-Called "Most-Favored-Lender" Doctrine Does Not Allow The Exportation Of Late Payment Fees

Since 1874, §85 of the National Banking Act has been interpreted as entitling a national bank to charge the highest interest rate allowed to lenders by the law of the state in which the bank is located under the so-called "most-favored-lender" doctrine announced by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 411-13 (1874). In *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 317-19 (1978), this Court relied on the National Banking Act and the most-favored-lender doctrine in holding that a national bank's authorized exportation of lending terms was *limited to* numerical percentage-rate interest terms. Contrary to the assertion of the court below, *see* A-23, however, the *Marquette* Court made no mention of the exportation of *other* credit card terms, such as late payment charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit card loans could be imposed on customers in other states. As the Supreme Court of New Jersey stated in *Sherman*:

> *Marquette* does not mandate or encourage an extension of the "most-favored-lender" status to expand the definition of "rates" to include other non-interest rate charges. The national

> bank's authorized exportation of lending terms in *Marquette* was limited to numerical percentage-rate interest terms. The Court made no mention of the exportation of other credit-card terms, such as late charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit-card loans could be imposed on customers in other states.

1995 N.J. LEXIS 1355, at *21 (citing *Smiley*, 900 P.2d at 713-14 (Arabian, J., dissenting).[9]

---

[9] In *Smiley*, dissenting Justice Arabian of the Supreme Court of California pounced on the notion that when Congress spoke of "interest rates" more than a century ago, it really meant something more than that, namely, non-interest-rate charges, *including* late payment penalties:

> The vice of this reasoning is that neither the [Supreme Court] in *Marquette* nor the Congress of 1864 wrote or legislated against a backdrop of interstate banking, an arrangement that did not exist even in 1978 and was inconceivable in 1864. . . .
>
> The opinion in *Marquette*, of course, addressed only the question of interest rates; it does not hint at, much less embrace, the Pickwickian notion of "interest" embraced by the majority. . . .
>
> Given the system of regional banking that even today continues to be the prevailing pattern, it is evident that in 1864 American banks did not "export" rates across state lines or that they even conceived of doing so. Congress thus could not have legislated with an awareness, however unarticulated, of "true" interstate banking as we are only coming to perceive it, however dimly, today. The pressures that drive the economic behavior of Citibank and like banks (and that lead to class actions such as this one) were unknown to the world of American banking until around 20 years ago. Because the Congress of the

Yet, in this case the court below misread *Marquette* and the "most-favored-lender" doctrine to justify an expansive reading of the federal statutory term "interest." A-23, A-27. Once again, the *Sherman* court has correctly interpreted the applicable law and its cogent analysis demonstrates why this Court should grant review in this case.

4. Section 521's Language And Legislative History Supports The Conclusion That Preemption Of State Credit Card Regulation Is Confined To Traditional Numerical Interest Rates

While the language of §521 of DIDA, enacted in 1980, essentially mirrors §85 of the National Banking Act and, as a result, §521 has been interpreted as conferring on federally insured state banks the same insulation from state usury laws that national banks have enjoyed under §85,[10] the legislative history of DIDA strongly supports

---

> Civil War era could not have foreseen such developments, it could not have enacted [§]30 of the National Bank Act with the idea of "interest" . . . that permits the exportation of credit terms – including late payment penalties – unrelated to interest rates allowed by the exporting bank's home state.

900 P.2d at 713-14 (Arabian, J., dissenting) (citations omitted).

[10] DIDA was enacted in 1980 following an enormous credit crunch in which interest rates rose to record levels. National banks, which could lend money at one percent (1%) above the Federal Reserve discount rate, were perceived to have a distinct competitive advantage over their state-chartered counterparts, which were bound by state usury laws. In order to equalize this advantage, Congress enacted legislation permitting state-chartered banks to export the interest rates of their home states

the understanding that "preemption of credit-card regulation under DIDA is confined to traditional numerical interest rates." *Sherman*, 1995 N.J. LEXIS 1355, at *23. Thus, contrary to the conclusion reached by the California courts in this case, *see* A-23 to A-24, when enacting §521, Congress did not intend to bar states from prohibiting late payment fees by credit card issuers. *Sherman*, 1995 N.J. LEXIS 1355, at *23-*27.

In *Sherman*, the Supreme Court of New Jersey stated that "[a] fair reading of the [DIDA's] legislative history indicates that Congressional concern was focused with particularity on numerical or percentage interest rates," *id.* at *25, and quoted statements from the legislation's sponsors in support of this conclusion. *Id.* at *25-*26. The New Jersey court also observed that post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late payment fees by credit card issuers, noting that in 1981

---

abroad, as national lending institutions had been doing through the National Banking Act. *See* A-23 to A-24; *Sherman*, 1995 N.J. LEXIS 1355, at *22-*25. *See generally* William S. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 Bus. Law. 1079, 1096-97 (1982). Consequently, §521 of DIDA borrowed language extensively from §85 of the National Banking Act, but also added a preemption clause. *See* 12 U.S.C. §1831d(a) ("In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates," a state bank "may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section," charge interest at the "rate allowed" by the laws of its home state, or one percent (1%) over the Federal Reserve discount rate, whichever is greater.)

and in 1983-1984 the Senate (but not the House of Representatives) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late payment charges from preemption. *Id.* at *26. Thus,

> the fact that Congress was specifically concerned about effecting a presumption limited to numerical interest rates is significant. If we cannot attribute to legislative initiative of 15 years ago the intent to include discrete, specialized charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier. That is especially so when the later statute substantially paralleled the language of the former, and it was passed in an effort to give federally-insured state banks status equal to national banks that had enjoyed a superior status since the enactment of the earlier act. Thus, it would be contrary to common sense to conclude that in enacting the [National Banking Act], Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance.

Id. at *27. Once again, in *Sherman* the New Jersey court has demonstrated the grievous analytical errors committed by the California courts in this case, presenting yet another reason why review should be granted.

5. The First Circuit's Decision In *Greenwood Trust*, Which The Court Below Followed In This Case, Does Not Support The Notion That The Federal Statutory Term "Interest" Includes Late Payment Fees

While the California Court of Appeal's decision relied unquestioningly on the First Circuit's decision in *Greenwood Trust*, 971 F.2d at 823-29, and several district court cases which slavishly followed it, *see* A-24 to A-25, the Supreme Court of New Jersey correctly concluded in *Sherman* that those cases "are unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of 'interest.' " 1995 N.J. LEXIS 1355, at *28. Noting that *Greenwood Trust* asserted that prior case law supported the notion that federal common law construes "interest" to encompass a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate (reasoning which the California courts wholeheartedly embraced in this case, A-24 to A-25), the *Sherman* court correctly countered that "[i]nimical to the holding in *Greenwood Trust*, a careful examination of the cases cited [by the First Circuit] does not establish that Congress intended to include late-payment fees within a federal definition of interest" under either §85 of the National Banking Act or §521 of DIDA. 1995 N.J. LEXIS 1355, at *28-*29.[11]

---

[11] In *Sherman*, the Supreme Court of New Jersey also rejected Citibank's reliance on the decision of the Supreme Court of California in *Smiley* to support its position that "interest" under §85 of the National Banking Act includes late payment charges. Regarding the California court's decision, the

In this case, however, the California Court of Appeal accepted the conclusion reached by the First Circuit in *Greenwood Trust* without properly analyzing the legal issues involved. With these flaws having been highlighted by the Supreme Court of New Jersey in *Sherman*, this Court should grant review to resolve this issue.

6. Interpretive Rulings Of The Office Of The Controller Of The Currency Concerning The Meaning Of "Interest" Are Not Entitled To Deference In This Case

Contrary to the conclusion of the court below, *see* A-25 to A-26, in *Sherman* the New Jersey court correctly held that a 1988 interpretive ruling issued by the Office of the Controller of the Currency ("OCC"), the federal agency charged with enforcement of the National Banking Act, is not strong evidence that late payment fees constitute "interest" for purposes of that federal statute;[12] indeed, as the Supreme Court of New Jersey stated, the "soundness of this ruling, and its value as authority, are

---

New Jersey court stated that "[t]he majority [opinion] in *Smiley* bases that conclusion in large measure on its understanding of historical legal usage," *id.* at *35 (citing *Smiley*); however, "[i]n our view . . . interest in its historical setting is limited to a periodic charge expressed as a percentage of a principal balance due." *Id.*

[12] In this case, the California Court of Appeal stated that in Interp. Letter 452, Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988), the OCC took the position that state laws regulating late charges by banks are preempted by federal banking statutes, a pronouncement which the court below held was entitled to "deference by the courts." A-25 (citations omitted).

greatly undermined when placed in the context of conflicting OCC rulings." *Sherman*, 1995 N.J. LEXIS 1355, at *36. As *Sherman* explained, an examination of OCC interpretative letters over the years reveals "significant inconsistent administrative treatment" of the term "interest" in respect of the National Banking Act. *Id.* at *40.

In this case, the court below failed to conduct a critical historical analysis of the OCC interpretative letters, yet it gave that federal agency an unjustified deference that its inconsistent treatment of these issues scarcely deserves. Once again, this failure on the part of the California Court of Appeal demonstrates why review should be granted by this Court.

7. The Bank's Late Payment Fees Are Impermissible Under California Law

Rejecting the ultimate conclusion embraced by the court below in this case, *see* A-32, in *Sherman* the Supreme Court of New Jersey held that "[c]onsumer credit protection is a fundamental local interest, long recognized by Congress, and it thus should not be displaced by the sweeping preemption" urged by the bank; thus, because New Jersey law prohibited banks from charging late payment fees, "we hold that [Citibank's] late-fee charges violate this state's usury laws and are thus impermissible." 1995 N.J. LEXIS 1355, at *59. The same result should have been reached by the California courts in this case, which abdicated their constitutional duty to uphold the contract and consumer protection laws of this State (particularly §1671 of the California Civil Code) in favor of Delaware law.

Each one of the six reasons discussed above presents compelling grounds for this Court to grant review in this case. Moreover, the failure of the court below to properly apply the applicable preemption doctrines (as discussed below) presents additional reasons why this Petition should be granted.

E. The Decision Of The Court Below Wrongly Applied A Presumption Against Preemption, Rather Than The Proper Standard

When considering Chase's preemption claim, the California courts should have heeded the longstanding presumption that "Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and that they should not unnecessarily disturb "the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Where the field that Congress is said to have preempted has been traditionally occupied by the states, " 'the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the *clear and manifest purpose* of Congress.' " *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (plurality opinion) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

This presumption is particularly applicable in this case, which involves both banking and consumer protection laws. It is well-settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain traditionally occupied by the states. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)

("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern."); *see also Smiley*, 900 P.2d at 715 (Arabian, J., dissenting) ("So solicitous has Congress historically been of the interests of the states in the regulation of banking, both state and federally chartered, that the [Supreme Court] has adopted an *especially restrictive standard of preemption* by which to judge federal laws that impact state regulation of federal banks.") (emphasis added). That preemption test, announced by this Court a century ago in *McClellan v. Chipman*, 164 U.S. 347, 357 (1896), requires the invalidation of a state law only where it "incapacitates the [national] banks from discharging their duties to the government. . . . "[13]

The preemption test specially applicable to state banking laws as they affect national banks, reflecting as it does a generous deference to state banking laws in the regulation of federally chartered banks, is consistent with

---

[13] *Accord Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) (invalidation only where state laws "infringe the national banking laws or impose an undue burden on the performance of the banks' functions"). *See also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission decree preempted major elements of the local law; "[b]ecause consumer protection is a field traditionally regulated by the states, *compelling evidence* of an intention to preempt is required in this area.") (emphasis added); *Sherman*, 1995 N.J. LEXIS 1355, at *16-*17; (same); *Smiley*, 900 P.2d at 715 (Arabian, J., dissenting), at 716-17 (George, J., dissenting). *See generally* Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 Stan. L. Rev. 687, 690-95 (1980).

the long history of the dual banking system. One feature is that, in the words of this Court, "[n]ational banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation.' " *McClellan*, 164 U.S. at 356-57 (quoting *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870)). Thus, as the Supreme Court of California stated in *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503 (1985), " '[whatever] may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863"; thus, "[i]n only a few instances has Congress explicitly preempted state regulation of national banks . . . [and] the rule is that state laws apply. . . . " 702 P.2d at 520 (quoting *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980)).

Thus, under the preemption doctrine traditionally followed by this Court, Chase bears the burden of demonstrating federal preemption; indeed, under this Court's decision in *McClellan*, 164 U.S. at 357, it bears the impossible burden of demonstrating that application of California's ban on late charges unrelated to actual damages, as set forth in Cal. Civ. Code §1671(c)-(d), will in any sense *incapacitate* it from carrying out its duties as a federal instrumentality. *See Smiley*, 900 P.2d at 715 (Arabian, J., dissenting); *see also Perdue*, 702 P.2d at 520 (where a national bank failed to satisfy its burden to demonstrate federal preemption, a California court could properly apply the state's consumer protection laws in determining the validity of fees imposed by a national bank for processing "bounced" or "NSF" checks).

The courts below ignored (or misread) this well-settled precedent; in fact, in this case the California courts *reversed* the presumption against preemption. Even though recognizing that there were no clear statements in §85 of the National Banking Act or its legislative history of Congressional intent to preempt state regulation of liquidated damages on revolving credit accounts, nevertheless the court below held that Congress *intended* to preempt state law when it "lift[ed] [§]85's language and engraft[ed] it onto [§]521" of DIDA, and concluded that "Congress's intent to define 'interest' in the broadest sense for preemption purposes could not be more clear." A-27. Thus, as the court below reasoned in this case, whenever Congress enacts a federal statute, it *intends* to preempt state law unless it specifically states otherwise. *Id.* That analysis, however, directly conflicts with the preemption standards set forth by this Court in *Rice*, *McClellan* and *Cipollone* and presents yet another compelling reason why review should be granted in this case.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

DATED: December 15, 1995

LEONARD B. SIMON
ALAN M. MANSFIELD
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

LESLIE U. HARRIS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. CHASE MANHATTAN BANK, N.A., and DOES 1 through 50, Defendants.	Case No. 941164 CLASS ACTION FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF 1. For Declaratory Judgment 2. Violation of Civil Code § 1671 3. Unlawful Business Practices in Violation of Business and Professions Code § 17200 4. Fraud and Deceit 5. Negligent Misrepresentation Plaintiff Demands A Trial By Jury

Plaintiff, on behalf of himself and all others similarly situated, makes the following allegations on information and belief based upon, *inter alia*, the investigation of its counsel.

INTRODUCTION

Plaintiff, by his attorney, brings this challenge to unlawful business practices on behalf of himself, a class

of all others similarly situated, and the general public. Plaintiff seeks damages, declaratory relief, and restitution and complaints and alleges as follows:

PARTIES

1. Plaintiff Leslie U. Harris is a resident of San Francisco County, California. Plaintiff brings this action both in his individual capacity and on behalf of all others similarly situated against the named defendant. Plaintiff has been the holder of a Chase Mastercard credit card and plaintiff brings this case on his own behalf and on behalf of all Chase Mastercard and Visa holders in California. Plaintiff has been charged late charges by defendant in San Francisco County. In so doing, plaintiff either directly or indirectly relied upon, *inter alia*, the representations, advertising, agreements and other promotional materials which were prepared and approved by the defendant and its agents and disseminated through advertising media and direct mail containing the misrepresentations and omissions alleged herein.

2. Defendant Chase Manhattan Bank, N.A., ("Chase") is a Delaware corporation with its principal place of business in New York, New York. Chase has charged the plaintiff and other similar situated persons a late charge. In fact, Chase charged plaintiff Harris a $10.00 late charge on February 20, 1992.

3. The true means and capacities of the defendants sued herein as Does 1 through 50 are unknown to plaintiff, who therefore sue them by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of these defendants when they have

been determined. These defendants are responsible in part for the acts and omissions alleged herein.

4. At all times herein mentioned in the causes of action into which this paragraph is incorporated by reference, each and every defendant was an agent of each and every other defendant. In doing the things alleged herein, each and every defendant was acting within the course and scope of this agency, and was acting with the consent, permission and authorization of each of the remaining defendants. All actions of each defendant alleged herein were ratified and approved by the officers or managing agents of every other defendant. This paragraph is not intended to allege a conspiracy of any type.

JURISDICTION AND VENUE

5. This court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, § 10, because this case is a cause not given by statute to other trial courts.

6. This court has jurisdiction over defendant Chase because it is a corporation authorized to do business in California, registered with the Secretary of State of California, and does sufficient business in California and avails itself of the California market to render the jurisdiction of the California courts permissible under traditional notions of fair play and justice.

7. The damages suffered and sought to be recovered by plaintiff and the class he seeks to represent in the aggregate are in excess of the jurisdictional minimum of this court (although the individual claims of every class

member would not exceed this amount), but the exact amount of damages caused to the class members cannot be precisely determined without access to defendant's records. Venue is proper in this court since plaintiff, as well as thousands of class members, entered into an agreement with the defendant or its agents or subsidiaries and otherwise engaged in the transactions which form the basis of this action by paying the late charges in question and/or by entering into an agreement for the use of the subject credit cards distributed by defendant in San Francisco County.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated. The class which plaintiff seeks to represent is composed of all California residents who have been charged a late charge in connection with the use of a credit card issued by Chase since March 6, 1988. Plaintiff also challenges the legality of the late charges in a representative capacity on behalf of Chase credit card holders and the general public pursuant to Business and Professions Code §§ 17200 and 17204.

9. The class is composed of thousands of persons, the joinder of whom is impracticable, and the disposition of its claims in a class action will benefit both the parties and the court. The class is sufficiently numerous, since the defendant advertises, promotes, distributes and collects late charges from credit cards issued directly to California consumers.

10. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact common to the class predominate over questions which may affect individual class members, including, but not limited to, the following:

(a) Whether and in what amounts Chase assessed late payment charges on credit cards accounts that are common to the class;

(b) Whether Chase's conduct violated Business and Professions Code § 17200, *et seq.*;

(c) Whether Chase's conduct violated California Civil Code § 1671(c) and (d), which circumscribe liquidated damages provisions in consumer transactions and agreements; and

(d) Whether Chase charged late fees under false pretenses by refusing and/or failing to disclose that such charges were illegal.

11. By paying the illegal late charges imposed by defendant, plaintiff is asserting claims that are typical of the claims of the entire class, and plaintiff will fairly and adequately represent and protect the interests of the class in that he has no interests antagonistic to those of the class. Plaintiff has retained counsel who are competent and experienced in class action litigation.

12. Plaintiff and the class have suffered irreparable harm and damages as a result of defendant's wrongful conduct as alleged herein. Absent a class action, defendant will likely retain the millions of dollars received through its wrongdoing. Because of the small size of the

individual class members' claims, few, if any, class members could afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the class members will continue to suffer losses, allow the imposition of late charges to proceed without remedy and allow defendant to retain the proceeds of its ill-gotten gains. Even today the defendant continued to charge illegal late charges, thereby receiving further revenues and profits.

13. Plaintiff also challenges the legality of credit late charges in a representative action on behalf of Chase's credit card account holders and the general public pursuant to Business and Professions Code §§ 17200, 17203 and 17204. A representative action is appropriate and necessary because Chase had engaged in the acts described herein as a general business practice. Plaintiff requests that this court decide that the Late Payment Charge utilized by Chase is unlawful and unenforceable, and order Chase to make restitution to all affected cardholders and class members.

14. Notice of the pendency of this action can be given either by regular mail or by publication, which cost, under California law, can reasonably be imposed upon the defendant.

FIRST CAUSE OF ACTION

(Bank Card Agreement Authorizing Over-Limit and Late Charges and Late Payment Charges is Illegal)

15. Plaintiff realleges and incorporates herein as though fully set forth the allegations of ¶¶1-14 above.

16. Plaintiff and Chase were debtor and creditor, respectively, under the bank card agreement through which plaintiff obtained and maintained a credit card with Chase. The agreement between Chase and plaintiff was smaller or identical in all material respects to the agreements of other Chase consumer customers.

17. The credit cards issued by Chase to plaintiff and members of the class were used primarily for personal, family, or household purposes. Accordingly, the late charge provision of the Chase Card Agreement is void pursuant to Civil Code, § 1671(c) and (d), which prohibit the setting and/or collecting of excessive fixed damages amounts in anticipation of breach.

18. The terms, conditions and language of the Bank Card Agreement were created and drafted unilaterally – and entirely – by Chase. The provisions of the agreement were offered on a "take-it-or-leave-it" basis. Chase possessed vastly superior knowledge, experience, and expertise over any individual customer or cardholder in devising, defining, and describing the terms, conditions, and provisions of the agreement. Individual cardholders, class members and plaintiff were without sufficient bargaining power to compel Chase to negotiate, bargain for, and/or to obtain terms other than as promulgated by Chase.

19. With respect to payments, the bank card agreement requires that each cardholder must pay at least the minimum payment due shown on periodic statement by the payment due date. If not the bank card agreement authorizes Chase to impose a late charge of $10.00 each time a payment is late.

20. An actual controversy has arisen between plaintiff and defendant. Defendant Chase contends that it is entitled, by contract, to impose late charges on plaintiff's account. Plaintiff contends that the Bank Card Agreement which authorizes the late charges imposed by Chase on his accounts is illegal under Cal. Civil Code § 1671(c) and (d).

21. Plaintiff desires a judicial determination of his rights and obligations. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his rights and obligations and those of all class members.

SECOND CAUSE OF ACTION

(Unlawful Fixing of Damages In Anticipation of Breach of the Duty to Make Timely Periodic Payments)

22. Plaintiff realleges and incorporates herein as though set forth in full the allegations of ¶¶1-21 above.

23. The late charge provision of Chase's bank card agreement is void because it violates the prohibition in Civil Code, § 1671(d) against setting and/or collecting excessive fixed damages amounts in anticipation of breach.

24. Chase anticipated at the time plaintiff's accounts were opened, that from time to time plaintiff and other cardholders would breach their agreements with Chase by making payments after the date they were/are due, on the "due date" set forth on each monthly billing statement of Chase to its respective cardholders.

25. Chase's bank card agreement provides, *inter alia*, for the payment of late charges of $10.00 each in anticipation of breach of the obligation to make timely and sufficient payments.

26. All of Chase's bank card agreements contain the identical late payment charge terms, insofar as the agreements repeat common and similar language regarding monthly payments and late charges, and the amount charged to each account holder of Chase is the same for failure to perform according to the terms' express language.

27. At the time of the formation of the agreements between plaintiff and Chase, the amount of damages, if any, to be sustained by Chase by virtue of the credit cardholders' failure to make timely and sufficient monthly payments was, and now is, practicable and simple to ascertain, and was limited to the time value of money owed by respective cardholders and not received by Chase concerning particular periodic payments.

28. The bank card agreement expressly requires that a "minimum payment" be made for each monthly billing period. If the "minimum payment" is not received by Chase on or before the payment due date shown on the statement, the account holder has breached the agreement, and Chase imposed the $10.00 late payment charge.

29. At no time did Chase negotiate with plaintiff or other cardholders over the anticipated damages to Chase flowing from failure to pay as obliged. At no time did Chase disclose the true amount of actual damages to be sustained by Chase from plaintiff's breach, or breach by other cardholders, and this amount was known or should

have been known by Chase at the time of the formation of each respective agreement.

30. Plaintiff alleges, on the basis of information and belief, that the actual damages to be sustained or in fact sustained by Chase as a result of late and/or insufficient payments were less than the $10.00 charge imposed on plaintiff's and class members' accounts by Chase.

31. Plaintiff, class members and all Chase's cardholders have suffered monetary damage by reason of Chase's imposition of excessive late fee charges.

THIRD CAUSE OF ACTION

(Violations of California Business & Professions Code Section 17200, et seq.)

32. Plaintiff realleges and incorporates herein as though set forth in full the allegations of ¶¶1-31 above.

33. The Unfair Trade Practices Act defines unfair competition to include any "unfair," "unlawful," or "deceptive" business practice. Business and Professions Code § 17200. The Act provides injunctive relief, restitution, and disgorgement of profits for violations. *Id.* § 17203. The imposition of late charges by Chase has resulted in the unlawful, unfair and unjust collection and retention by Chase of substantial sums of money from its cardholders. Plaintiff requests that this court exercise its jurisdiction pursuant to the Unfair Trade Practices Act to order that Chase make restitution to plaintiff and ascertainable cardholders, and to disgorge all monies which it unlawfully obtained.

34. Chase acted unlawfully in that its practice of fixing and imposing excessive, punitive damages amounts as late charges in anticipation of breach and/or upon breach is expressly forbidden by § 1671(d) of the California Civil Code for any and all persons who utilize the credit card device for retail purchases of personal property or services primarily for the cardholder's personal, family, or household purposes. The overwhelming majority of credit cards issued and used pursuant to Chase's Bank Card program was expected or known by Chase to be intended by the cardholders to be used for the above-described purposes.

35. Chase's late charges imposed on plaintiff and all other cardholders were unfair in that:

(a) the amount of damages to be incurred by Chase was readily ascertainable before or at the time of formation of the agreement;

(b) the prospective cardholders were not permitted the opportunity to negotiate over the inclusion of the provisions in the agreement or the amounts called for by the terms of the agreement; and

(c) Chase knew or should have known that the terms and amounts constituted a penalty to compel performance and/or a scheme whereby Chase would accumulate excessive profits and thus unjustly be enriched at the direct expense of its cardholders.

36. Chase's imposition and collection of late charges is a business practice which is unlawful, unfair and deceptive. Pursuant to Business and Professions Code

§ 17203, *et seq.*, plaintiff and other cardholders are entitled to obtain restitution of all funds obtained by Chase by reason of Chase's unlawful, unfair, and/or deceptive practices and to disgorge all profits which Chase unlawfully and unfairly obtained. Plaintiff and cardholders are also entitled to an injunction of further unlawful, unfair and/or deceptive practices. Plaintiff and cardholders are also entitled to recover their reasonable attorneys' fees pursuant to Code of Civil Procedure § 1021.5.

FOURTH CAUSE OF ACTION

(Fraud and Deceit)

37. Plaintiff hereby incorporates by reference ¶¶1-36 above.

38. Defendant made several representations about late charges through its long-term advertising, promotional and marketing campaign.

39. These representations about late charges are false and misleading in that they falsely represent that defendant "may" lawfully impose a $10.00 late charge, thereby implying that $10.00 is a lawfully-arrived-at late fee. These representations are also misleading for failing to disclose that the costs reasonably related to collecting and accounting for late credit card payments were less than $10.00.

40. Defendant made, or should have made, efforts to apprise itself with all applicable laws governing credit card late charges through its lawyers and others. Defendant was aware, or should have been aware, both before

and after the November 12, 1991 decision in *Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d 1383 (1991) that a $10.00 late charge may be unlawful. Defendant knew or recklessly disregarded that: (1) the costs reasonably related to collecting and accounting for a late charge were less than $10.00; and/or (2) overstated the costs reasonably related to collecting and accounting for a late charge to justify the imposition of a $10.00 late charge by including costs that were not directly caused by a late payment; and/or (3) inflating the actual costs reasonably related to collecting and accounting for a late charge. The amount of costs reasonably related to collecting and accounting for late charges is within the exclusive knowledge of defendant and not open to examination and inquiry by plaintiff and the class members. Such representations and/or omissions, were made with the intent to defraud and induce plaintiff's and all class members' reliance as evidenced by the request for and actual payment of such late charges.

41. Plaintiff and the class members, unaware of the falsity of defendants' representations, and/or omissions, paid the illegal late charges, reasonably relying upon the representations of the defendant that such a late charge could lawfully be imposed.

42. As a proximate result of the defendant's active misrepresentations or concealments of material facts regarding the illegality and/or setting of the late charges, plaintiff and the class have suffered damages through its payment of said late charges. The total amount of damages suffered by plaintiff and members of the class as a result of its payments cannot be fully ascertained without

access to defendant's records and will be proven at the time of trial.

43. Defendant's suppression and/or misrepresentation of the material facts set forth above defrauded plaintiff and the class, in violation of California Civil Code §§ 1572, 1709 and 1710, as well as principles of common law, for which plaintiff and members of the class are entitled to recover compensatory damages, interest, and attorneys' fees and costs.

44. Defendant's conduct described herein was done with conscious disregard of plaintiff's rights and with the intent to vex, injure or annoy plaintiff and members of the class such as to constitute oppression, fraud or malice under California Civil Code § 3294, entitling plaintiff and the members of the class to an award of punitive damages, in an amount appropriate to punish or set an example of defendant.

FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

45. Plaintiff incorporates by reference ¶¶1-44 above.

46. In making the representations of fact to plaintiff and the members of the class described herein, the defendant failed to fulfill its duty to disclose the material facts set forth above. Defendant's partial disclosure that it would impose a late charge gave rise to a duty to disclose the costs reasonably related to collecting and accounting for late credit card payments. Moreover, defendant had a duty to estimate the fair average compensation for any loss it sustained as a result of collecting and accounting

for late credit card payments in order to justify the late charge under Civil Code § 1671. Among the direct and proximate causes of said failure to disclose was the negligence and carelessness of the defendant.

47. Plaintiff, unaware of defendant's affirmative misrepresentations and its failure to disclose the fact that the late charges it was imposing were unconscionable and illegal, paid the improper late charges. Had plaintiff known the true facts, he would not have taken such action. By reason thereof, plaintiff and the other class members have suffered damages in an amount according to proof at the time of trial, plus interest, attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That this action may be maintained as a class action and as a representative action under the Business and Professions Code § 17200, *et seq.*;

2. That this court issue a declaration of the respective rights and obligations of the parties, concluding that the late charges imposed by Chase were illegal and unfair;

3. That plaintiff, cardholders, and members of the class be awarded actual and punitive damages, including prejudgment interest in an amount according to proof against Chase;

4. That Chase be ordered to make restitution to all ascertainable cardholders for any and all amounts collected by Chase through its unlawful and unfair business

practices alleged above, including interest on the sums wrongfully collected, and to disgorge all profits which resulted from Chase's unlawful and unfair business practices;

5. That plaintiff be awarded reasonable attorneys' fees, expenses and costs of suit; and

6. That plaintiff be awarded such other and further relief as the court may deem appropriate, just, and proper.

DATED: October 6, 1992

MILBERG WEISS BERSHAD
HYNES & LERACH
WILLIAM S. LERACH
ALAN M. MANSFIELD
FRANK J. JANECEK, JR.
TIMOTHY G. BLOOD

600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

BUSHNELL, CAPLAN &
FIELDING
ALAN M. CAPLAN
PHILIP NEUMARK

/S/
ALAN M. CAPLAN

901 Market Street, Suite 230
San Francisco, CA 94103
Telephone: 415/777-5010

Attorneys for Plaintiff

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: October 7, 1992

MILBERG WEISS BERSHAD
HYNES & LERACH
WILLIAM S. LERACH
ALAN M. MANSFIELD
FRANK J. JANECEK, JR.
TIMOTHY G. BLOOD

600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

BUSHNELL, CAPLAN &
FIELDING
ALAN M. CAPLAN
PHILIP NEUMARK

/S/
ALAN M. CAPLAN

901 Market Street, Suite 230
San Francisco, CA 94103
Telephone: 415/777-5010

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF
SAN FRANCISCO

LESLIE U. HARRIS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. THE CHASE MANHATTAN BANK, N.A.; THE CHASE MANHATTAN BANK (USA); and DOES 2 through 50, Defendants.	No. 941164 ORDER SUSTAINING DEFENDANTS' DEMURRER WITHOUT LEAVE TO AMEND AND ENTRY OF JUDGMENT OF DISMISSAL Date: January 19, 1993 Time: 9:30 a.m. Dept: 9

The general demurrer of defendants The Chase Manhattan Bank, N.A. and The Chase Manhattan Bank (USA) to plaintiff's First Amended Complaint came on for hearing in Department 9 of this Court on January 19, 1993, the Honorable Lucy Kelly McCabe, presiding. Palmer Brown Madden of McCutchen, Doyle, Brown & Enersen and Alan S. Kaplinsky of Wolf, Block, Schorr and Solis-Cohen appeared as counsel for defendants, and Alan M. Mansfield of Milberg Weiss Bershad Specthrie & Lerach appeared as counsel for plaintiff.

Plaintiff's First Amended Complaint challenges the legality of a $10.00 late charge assessed by Chase pursuant to the terms of the agreement between Chase and its California credit card customers. Plaintiff asserts five causes of action in his First Amended Complaint for

declaratory judgment, violation of Civil Code section 1671 (pertaining to liquidated damages upon breach of contract), violation of Business and Professions Code sections 17200 and 17500 (pertaining to unfair, unlawful or fraudulent business acts and practices, and false and misleading advertising), violation of Civil Code sections 1572, 1709 and 1710 (pertaining to fraud, deceit and negligent misrepresentation) and state common law.

The Court, having reviewed and considered the First Amended Complaint on file herein, the supporting and opposing memoranda of points and authorities, having heard the arguments of counsel, and good cause appearing therefor:

IT IS HEREBY ORDERED that defendants' general demurrer be, and hereby is, sustained without leave to amend on the ground that all of the causes of action alleged in plaintiff's First Amended Complaint are preempted by section 85 of the National Bank Act (12 U.S.C. § 85) and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1831d).

IT IS FURTHER ORDERED that judgement of dismissal shall be, and hereby is, entered in favor of defendants.

DATED: February 3, 1993

/S/
LUCY KELLY MCCABE
JUDGE OF THE SUPERIOR COURT

Approved as to form:

BUSHNELL, CAPLAN & FIELDING

/S/
Alan M. Caplan

Attorneys for Plaintiff

McCUTCHEN, DOYLE, BROWN & ENERSEN

/S/
Daniel E. Birkhaeuser

Attorneys for Defendants
The Chase Manhattan Bank, N.A.
and the Chase Manhattan Bank (USA)

[No. A060791. First Dist., Div. Two Nov. 17, 1994.]

LESLIE U. HARRIS et al., Plaintiffs and Appellants, v. CHASE MANHATTAN BANK, N.A., et al., Defendants and Respondents.

SMITH, J. – Plaintiff and appellant Leslie U. Harris appeals from a summary judgment dismissing his class action on behalf of himself and all others similarly situated against defendant-respondent Chase Manhattan Bank, N.A. (Chase) for damages and injunctive relief as the result of allegedly unlawful late fees charged to Chase's credit cardholders.

The trial court granted judgment for Chase on the ground that plaintiff's state law-based action was preempted by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) (Pub.L.No. 96-221 (Mar. 31, 1980) 94 Stat. 132). Supported by the near unanimous weight of authority, we will affirm.

BACKGROUND

The facts are simple and undisputed. Until 1990, Chase was a national banking association located in Delaware. Since June 21, 1990, Chase has been a federally insured state chartered bank located in Delaware.

Chase issues Visa and MasterCard credit cards to customers in California. Plaintiff was the holder of a Chase MasterCard residing in the City and County of San Francisco. Under the cardholder agreement, each cardholder must make a minimum payment by the due date on the periodic statement. If the cardholder fails to make such payment by the due date, Chase is authorized to change a $10 late fee as a result of the cardholder's breach of his obligation to make timely payments. On February 20, 1992, Chase assessed a $10 late charge to plaintiff's account under the provisions of the foregoing agreement.

In an amended complaint brought on behalf of himself and other similarly situated cardholders, plaintiff alleges that the late charge constitutes a liquidated damages penalty in violation of Civil Code Section 1671 (section 1671) and California law. He seeks both damages and injunctive relief pursuant to Business and Professions Code sections 17200 and 17204.

Chase demurred to the complaint on federal preemption grounds. Relying on *Greenwood Trust Co. v. Com. of Mass.* (1st Cir. 1992) 971 F.2d 818, certiorari denied (1993), ___ U.S. ___ [122 L.Ed.2d 129, 113 S.Ct. 974] (*Greenwood Trust*) the trial court found that plaintiff's action against Chase was preempted by the National Banking Act (NBA), section 85 (12 U.S.C. § 85) and DIDA, section 521

(12 U.S.C. § 1831d). The demurrer was sustained without leave to amend and plaintiff appeals from the judgment of dismissal.

APPEAL

This case is one of many recent class actions brought throughout the country in which credit cardholders have challenged loan fees assessed by either national banks or those chartered in foreign states as violative of their own states' consumer protection laws.

The gravamen of plaintiff's action is that the credit card late fee charged by Chase violates California law because it is in the nature of a penalty or liquidated damages for breach of the credit card agreement, having no relation to the actual damages incurred by Chase as a proximate result of such breach. (*See* § 1671; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1398-1401 [1 Cal.Rptr.2d 446].) Under the law of Chase's home state of Delaware, the subject late fee fits within the definition of "interest" and is perfectly legal. (*See* Del. Code Ann. tit. 5, §§ 945, 950.) (1a). The question presented here is whether, by virtue of DIDA section 521, Chase may "export" Delaware's law applicable to late fees, even though it may conflict with California law governing liquidated damage penalties.

Section 85 of the NBA, enacted by Congress in 1864, provides that a national bank "may take, receive, reserve and charge on any loan . . . *interest at the rate allowed by the laws of the State . . . where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in

the Federal reserve district where the bank is located, whichever may be the greater. . . . " (Italics added.)

The intent of section 85 was to protect national banks from discriminatory state banking laws and insure " 'competitive equality' " between state and national banks. (See *Greenwood Trust, supra,* 971 F.2d 818, 826, n.6; *Marquette v. First Nat. Bank of Omaha Corp.* (1978) 439 U.S. 299, 314 [58 L. Ed. 2d 534, 545, 99 S.Ct. 540] (*Marquette*).)

Ten years after the NBA was enacted, the United States Supreme Court announced the "most favored lender" doctrine pursuant to which national banks could not be placed at a competitive disadvantage with respect to any state-regulated lender. (*Tiffany v. National Bank of Missouri* (1873) 85 U.S. (18 Wall.) 409 [21 L.Ed. 862].) The doctrine has been interpreted to mean that national banks must be given the same interest rate privileges as any person or entity in the state lending money under like conditions. (See *Fisher v. First Nat. Bank of Chicago* (7th Cir. 1976) 538 F.2d 1284, 1289-1290.) In *Marquette, supra,* the court went one step further and held that section 85 permitted a national bank to "export" a favorite credit card interest rate from the state in which it was located to customers in another state. (439 U.S. at pp. 317-319 [58 L.Ed.2d at pp. 547-548].)

DIDA was enacted in 1980 following an enormous credit crunch in which interest rates rose to record levels. National banks, which could lend money at 1 percent above the Federal Reserve discount rate, enjoyed a distinct competitive advantage over their State-chartered counterparts, which were bound by often restrictive state usury laws. In order to equalize this advantage, Congress

enacted legislation permitting state-chartered banks to export the interest rates of their home states abroad, as national lending institutions had been doing through the NBA. *Greenwood Trust, supra,* 971 F.2d 818, 826; *Stoorman v. Greenwood Trust Company* (Colo.Ct.App. Apr. 7, 1994) [Dock. No. 93CA0224] ___ P.2d ___ (*Stoorman*).) Consequently, section 521 of DIDA borrowed language extensively from section 85, but also added a preemption clause. It provides that "[i]n order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates," a state bank "may, *notwithstanding any State constitution or statute which is hereby preempted* for the purposes of this section," charge interest at the "rate allowed" by the laws of its home state, or 1 percent over the federal reserve discount rate, whichever is greater. (12 U.S.C. § 1831d(a), italics added.)

It was against this background that *Greenwood Trust* was decided. The issue there was whether a federally insured bank chartered in Delaware could impose late fee charges on its credit cardholders residing in Massachusetts, which fees were prohibited by a Massachusetts consumer protection statute.

The First Circuit held that the Massachusetts statute was substantively preempted under section 521, employing the following reasoning: (1) due to the unequivocal preemption language of the statute, if section 521 preempts state law, it does so expressly and not by implication; (2) in order to "level the playing field" in interest rate competition between national and state banks, Congress enacted DIDA, copying section 85's language with regard to interest rates; included within that language was the "exportation" principle as defined in *Marquette;*

(3) federal case law interpreting section 85 has consistently defined the term "interest" broadly to include not only numerical percentage rates but late fees and kindred charges in connection with the lending of money; (4) DIDA therefore permits a state bank to export its home State's entire usury law, including that state's expansive definition of interest; (5) under either federal common law or the law of Delaware late fees constitute "interest"; and thus (6) Massachusetts law prohibiting late fees must yield to the preemptive force of section 521. (*Greenwood Trust, supra,* 971 F.2d at 823-829.)

We agree with *Greenwood Trust*'s reasoning, as have a plethora of state and federal cases nationwide holding that either section 85 or section 521 preempt contrary state laws regulating late charges and other flat fees in connection with credit card lending. *Stoorman, supra,* ___ P.2d at ___; *Ament v. PNC Nat. Bank* (W.D.Pa. 1992) 825 F.Supp. 1243; *Watson v. First Union Nat. Bank of South Carolina* (D.S.C. 1993) 837 F.Supp. 146 [overlimit fees]; *Goehl v. Mellon Bank (DE)* (E.D.Pa. 1993) 825 F.Supp. 1239; *Tikkanen v. Citibank (South Dakota) N.A.* (D.Minn. 1992) 801 F. Supp. 270 (*Tikkanen*); *Hill v. Chemical Bank* (D.Minn. 1992) 799 F. Supp. 948 (*Hill*); *Nelson v. Citibank (South Dakota) N.A.* (D.Minn. 1992) 794 F.Supp. 312 (*Nelson*).

(2) Two federal banking agencies, the Office of the Comptroller of the Currency (OCC) (OCC Interp. Letter, 452 Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988)) and the Federal Deposit Insurance Corporation (FDIC) (*Hill, supra,* 799 F.Supp. at 953) have also taken the view that state laws regulating late charges by banks are preempted by federal banking statutes. The opinions of these agencies are entitled to deference by the courts. (*Clarke v.*

Securities Industry Assn. (1987) 479 U.S. 388, 403-04 [93 L.Ed.2d 757, 771-772, 107 S.Ct. 750] [OCC]; *FDIC v. Philadelphia Gear Corp.* (1986) 476 U.S. 426, 439 [90 L.Ed.2d 428, 439-40, 106 S. Ct. 1931] [FDIC]; *see also Conservatorship of Lambert* (1983) 143 Cal.App.3d 239, 244 [191 Cal.Rptr. 725] ["Interpretations of a federal statute by a federal agency, although not binding on the courts, are entitled to great weight. [Citations.]"].)

(1b) Plaintiff claims that the *Greenwood Trust* court wrongly applied a presumption in *favor* of preemption instead of the proper standard of presuming lack of preemption unless congressional intent appears unmistakable. (See *Cippollone v. Liggett Group, Inc.* (1992) ___ U.S. ___, ___ [120 L.Ed.2d 407, 422-423, 112 S. Ct. 2608, 2617]; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1072, [31 Cal.Rptr.2d 358, 875 P.2d 73] (*Mangini*).)

This argument overlooks the fact even before the enactment of section 521, federal courts had consistently construed the term "interest" in section 85 to embrace not only periodic percentage rates but a host of other fees incidental to the loaning or forbearance of money. (*Citizens' National Bank v. Donnell* (1904) 195 U.S. 369, 373-374 [49 L.Ed. 238, 241-42, 25 S.Ct. 49] [overdraft charges]; *Northway Lanes v. Hackley Union Nat. Bank & Trust Co.* (8th Cir. 1972) 464 F.2d 855, 863 [closing costs]; *Fisher v. First Nat. Bank of Omaha* (8th Cir. 1977) 548 F.2d 255, 258-261 [38 A.L.R.Fed. 792] [credit card cash advance fees]; *Panos v. Smith* (6th Cir. 1940) 116 F.2d 445, 446-447 [taxes and recording fees]; *Cronkleton v. Hall* (8th Cir. 1933) 66 F.2d 384, cert. den., 290 U.S. 685 [78 L.Ed. 590, 54 S.Ct. 121] [bonus or commission paid to lender].)

In lifting section 85's language and engrafting it onto section 521, Congress is presumed to have been aware of prior judicial decisions interpreting the older statute (*Holmes v. SIPC* (1992) ___ U.S. ___ [117 L.Ed.2d 532, 543-544, 112 S.Ct. 1311, 1317-1318), including the courts' sweeping construction of the term "interest." (*Greenwood Trust, supra,* 971 F.2d 818, 827.)[1] Viewed from this historical perspective, Congress's intent to define "interest" in the broadest sense for preemption purposes could not be more clear.

(3) Nor are we impressed by plaintiff's attempt to distinguish *Greenwood Trust* on the basis that the Massachusetts statute *prohibited* late fees whereas California only places certain limits on them. *Greenwood Trust*'s analysis is unaffected by whether the bank customer's state restricts late charges or totally bans them. In both cases, the issue turns on whether a bank chartered in another state can "export" its home state's definition of late charges as interest under the preemptive umbrella of section 521.

(4) Plaintiff also faults *Greenwood Trust* for not grasping the difference between "up-front" loan charges, which are *required* by the lender, and late fees, which are

---

[1] Cases cited by plaintiff and amicus Bankcard Holders of America which purportedly exclude late charges from the "federal common law" meaning of the term "interest" (e.g., *United States v. Texas* (1993) ___ U.S. ___ [123 L.Ed.2d 245, 253, 113 S.Ct. 1631, 1635]; *Johnson v. McCrackin-Sturman Ford, Inc.* (3d Cir. 1975) 527 F.2d 257, 265-266 [34 A.L.R.Fed. 450]; *In re Tastyeast, Inc.* (3d Cir. 1942) 126 F.2d 879, 881-882; *Lloyd v. Scott* (1830) 29 U.S. (4 Pet.) 205, 224 [7 L.Ed. 833, 839]) are not apposite, since none of them construed either section 85 or section 521.

contingent and the imposition of which is within the control of the borrower. He suggests that the former charges are more akin to "interest" whereas the latter are in fact penalties for breach of contract. Ancient federal cases holding that late penalties for loan delinquency are not usurious (*Spain v. Hamilton's Administrator* (1863) 68 U.S. (1 Wall.) 604, 626 [17 L.Ed. 619, 625-626]; *In re Tastyeast, Inc., supra,* 126 F.2d 879, 882) lend only superficial support to his position, for none of them interpreted section 85 or 521.

The cases interpreting section 85 do not recognize plaintiff's contingent/noncontingent distinction. Indeed, many of the types of lender-imposed fees which federal courts have deemed embraced within that statute's broad definition of interest were also "contingent" in the sense that they were in the control of the borrower (see cases cited pp. 1571-1572, *ante*). Furthermore, under section 85 (and by implication section 521) a bank may export not only its home state's periodic interest rate, but its *entire body of usury law,* even though it may conflict with the law of the customer's state of residents. (*First National Bank in Mena v. Nowlin* (8th Cir. 1975) 509 F.2d 872, 876; *Fisher v. First Nat. Bank of Omaha, supra,* 548 F.2d 255, 257-258). Thus, "[t]he fact that one state considers late fees to be penalties that do not implicate the usury laws does not by itself invalidate another state's determination that late fees are a component of the interest rate." (*Tikkanen, supra,* 801 F.Supp. 270, 278-279.) And under *Marquette,* Delaware's definition of interest may be exported

to Chase's California customers, notwithstanding its conflict with California law.[2]

(5) Citing *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913 [216 Cal.Rptr. 345, 702 P.2d 503] (*Perdue*), plaintiffs claim that our Supreme Court has already determined that DIDA preempts only state usury law, not traditional contract law governing liquidated damages.

The issue in *Perdue* was whether a national bank *located in California* could collect nonsufficient funds charges on deposit accounts under California law. The bank contended that plaintiff's claims were preempted by a "comprehensive federal statutory scheme" intended to displace state law in the field. *Perdue* dealt with section 501 of DIDA, which was conspicuously silent with respect to deposit services. It did not discuss section 521, which has a specific preemption clause pertaining to loans and interest rates. The court never addressed the crucial subject matter presented here, i.e., the interplay between the presumption clause and the meaning of the

---

[2] Classifying late charges as "interest" does no violence to the dictionary definition of the latter term, i.e., "[C]ompensation allowed by law or fixed by the parties for the use or forbearance or detention of money." (Black's Law Dict. (5th ed. 1979) at p. 729.) The cardholder who is late in tendering the minimum monthly payment enjoys use of that money in the meantime and the late charge compensates the lender for such forbearance. (See *Greenwood Trust, supra*, 971 F.2d 818, 825.)

Accordingly, we do not share the fear expressed by plaintiff and his amici curiae at oral argument that our holding will allow individual states to enact laws which define "interest" to include any kind of fees it pleases and that state's banks to export such excessive or outlandish charges to its out-of-state customers under the guise of "interest."

term "interest" as it is used in section 521. As the *Greenwood Trust* court observed, cases construing section 501 of DIDA are of little help in interpreting section 521. "In light of the irrefutable evidence that section 521 was conceived as an offspring of section 85 of the [NBA], we believe . . . [t]he proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name." (971 F.2d 818, 830, n.10.)

(6) Taking a different tack, amici curiae supporting plaintiff focus on that portion of the section 521 which states "notwithstanding any *State constitution or statute* which is hereby preempted for the purposes of this section . . . " (12 U.S.C. § 1831d(a), italics added) to argue that Congress intended to preempt only state statutes and constitutions which affect the meaning of the term "interest," not common law.

This argument is hardly persuasive. First, given the unmistakable intent of Congress to "level the playing field" and create lending party between state and national banks by preempting inconsistent statutes and state constitutions, an enormous loophole in the statute would be created if states were allowed to eviscerate this policy through the back door of the common law. As the FDIC recognizes, it is highly unlikely that Congress could have intended such a result. (Advisory Opn. No. FDIC 93-27 Fed. Banking L. Rep. (CCH) ¶ 81,635 (July 12, 1993).) Second, section 521 contains no savings clause which would evince an intent to preserve state common law claims, which Congress has done in other contexts. (E.g., 15 U.S.C. § 4406(c) ["Nothing in this chapter shall relieve any person from liability at common law. . . . "];

49 U.S.C. § 1506 ["Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law. . . . "]; *see Stoorman, supra,* ___ P.2d ___.) Third, plaintiff's claims *are* statutory in nature. They are grounded on the prohibition against liquidated damage penalties set forth in section 1671. The fact that section 1671 was a codification of preexisting case law does not, as plaintiff seems to imply, convert his action into one at common law.

In the face of the overwhelming number of state and federal cases which are in opposition to his position, plaintiff cites two cases which purportedly support it, *Donald v. Golden 1 Credit Union* (E.D.Cal. 1993) 839 F.Supp. 1394 (*Donald*) and *Irwin v. Citibank (South Dakota) N.A.* (Pa.Ct. C.P. Dec. 9, 1993) No. 9112-2557.

We will not discuss *Irwin*, a nonpublished decision of an out-of-state trial court.[3] The issue in *Donald* was not substantive preemption but jurisdictional preemption. That case turned on whether the preemptive force of sections 85 and 86 of the NBA was so extraordinary as to convert complaints asserting state law claims for unlawful contract penalties into federal claims for usury. *Donald* did not adjudicate the question of substantive preemption which we face here.

---

[3] Each side requests judicial notice of certain cases and has filed certain objections to the other side's request for judicial notice. We will not arbitrate this debate. Where appropriate, we will take note of state, federal and agency decisions which we find illuminating, guided only by the restrictions set forth in California Rules of Court, Rule 977 and our own common sense. (See *Mangini, supra,* 7 Cal. 4th 1057, 1064-1065.)

(7) Finally, amicus curiae Bankcard Holders of America suggests that interpreting section 521 in the manner suggested by *Greenwood Trust* in effect allows Delaware to define what constitutes "interest" for California's consumers. This construction, the argument runs, constitutes an impermissible delegation by Congress of this state's legislative powers to another state.

Congress, however, may properly choose to adopt definitional terms from the law of another state in pursuit of its overall objective of regulating banking. (*Greenwood Trust, supra,* 971 F.2d 818, 829.) As the Supreme Court recognized in *Marquette,* incorporation of the " 'exportation' " principle into federal banking law inevitably impairs the ability of some states to protect its citizens against what they perceive to be unfair lending practices. The court, however, did not view that impairment as a constitutional hurdle but simply "an issue of legislative policy" better left to the wisdom of Congress. (439 U.S. 299, 318-19 [58 L.Ed.2d 534, 547-48].)

(1c) We conclude that because Chase is chartered in Delaware, section 521 and the supremacy clause mandate that Delaware rather than California law controls its imposition of late charges on plaintiff's credit card account. The trial court thus correctly determined that plaintiff's complaint based on Chase's alleged violation of California restrictions on such charges, is preempted.

DISPOSITION

Affirmed.

Kline, P.J., and Phelan, J., concurred.

No. 1/2 A060791 - S044161

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

LESLIE U. HARRIS et al., Appellants

v.

CHASE MANHATTAN BANK, N.A. et al., Respondents

Review ordered on the court's own motion.

Submission of additional briefing, otherwise required by rule 29.3, Cal. Rules of Court, is deferred pending further order of the court.

DATE: February 23, 1995

Lucas
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Werdegar
Associate Justice

No. 1/2 A060791 - S044161

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

LESLIE U. HARRIS et al., Appellants

v.

CHASE MANHATTAN BANK, N.A. et al., Respondents

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division Two.

DATE: November 2, 1995

Lucas
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Werdegar
Associate Justice

Supreme Court, U.S.
FILED
JAN 8 1996
OFFICE OF THE CLERK

No. 95-951

In The

Supreme Court of the United States

October Term, 1995

LESLIE U. HARRIS, On Behalf of Himself and All Others Similarly Situated,

Petitioner,

v.

CHASE MANHATTAN BANK, N.A. And DOES 1 THROUGH 50,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ALAN S. KAPLINSKY
BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

ARTHUR R. MILLER
(Counsel of Record)
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

Counsel for Respondents

29 pp

QUESTION PRESENTED

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d, and Section 85 of the National Bank Act, 12 U.S.C. §85, authorize federally-insured state banks and national banks, respectively, to charge on their intrastate and interstate loans the "interest" allowed by the laws of their home States. The question presented is:

Whether the meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act is narrowly confined to percentage-based periodic interest rates, as held by the New Jersey Supreme Court, or also encompasses a flat late charge that a borrower has agreed to pay in the event of delinquency, as held by the Courts of Appeals for the First and Third Circuits and the Supreme Courts of California and Colorado?

Petitioner's "Questions Presented" are inaccurate insofar as they suggest that this case involves only Section 85 of the National Bank Act. During the period of time covered by the Complaint, Respondent The Chase Manhattan Bank (USA) converted its charter from a national bank to a federally-insured state bank. Therefore, this case involves Section 85 of the National Bank Act and Section 27 of the Federal Deposit Insurance Act.

Also, the second of Petitioner's "Questions Presented," which purports to raise a constitutional issue regarding delegation of Congressional powers, is procedurally improper because it was not raised in the courts below by Petitioner and has not been briefed in the Petition for a Writ of Certiorari.

RULE 29.6 STATEMENT

Respondents are The Chase Manhattan Bank (USA) and The Chase Manhattan Bank, N.A. Both Respondents are wholly owned by The Chase Manhattan Corporation. The Chase Manhattan Bank (USA) does not have any nonwholly owned subsidiaries. The first-tier nonwholly owned subsidiaries of The Chase Manhattan Bank, N.A. are 15253 Bake Parkway; Chase Automated Clearing House, Inc.; Corporation Falcon, Inc.; Credit Martiniquais; Electronic Payment Service Company (Hong Kong) Ltd.; Monthly Gyde, Inc.; Pantherhaven Limited; Societe de Developpement Regional Antilles; Superior One; and VCI, PLC.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. FACTUAL BACKGROUND 5

C. PROCEDURAL HISTORY 7

ARGUMENT 11

A. There Exists a Direct Conflict in the Courts Below Concerning the Meaning of "Interest" in Section 27 of the FDIA and Section 85 of the NBA 11

B. The Interpretation of the Meaning of "Interest" in Section 27 of the FDIA and Section 85 of the NBA Has Profound National Importance 14

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

In re: Citibank (South Dakota) Credit Card Litigation, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995) 12

Copeland v. MBNA America Bank, N.A., No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995) 3

Gadon v. The Chase Manhattan Bank (USA), 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending) 12

Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) 3, 7, 8, 13, 16, 18

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App. 4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995) 1, 3, 8, 9, 10, 11

Holmes v. Securities Investor Protection Corporation, 503 U.S. 258 (1992) 9

Hunter v. Greenwood Trust Co., No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-963 (U.S. Dec. 18, 1995) 3, 4, 11, 18

Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) 15, 17

Mazaika v. Bank One, Columbus, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Richardson v. Citibank (South Dakota), N.A., No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) 3

Sherman v. Citibank (South Dakota), N.A., No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995) 4, 11

Smiley v. Citibank (South Dakota), N.A., 11 Cal. 4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995) 3, 10, 18, 20

Spellman v. Meridian Bank (Delaware), Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) 3, 9, 19, 20

Stoorman v. Greenwood Trust Co., No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) 3

Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1874) 4, 17

Tikkanen v. Citibank, N.A., 801 F. Supp. 270 (D. Minn. 1992) 11

Vanderweyst v. First State Bank, 425 N.W.2d 803 (Minn.), *cert. denied*, 488 U.S. 943 (1988) 18

UNITED STATES CONSTITUTION

U.S. Const. art. VI, cl.2 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES

FEDERAL

12 U.S.C. §85 ..... *passim*

12 U.S.C. §1463(g) 4, 14

12 U.S.C. §1785(g) 4, 14

12 U.S.C. §1831d ..... *passim*

28 U.S.C. §1257(a) 1

Pub.L. No. 96-221, 94 Stat. 132 (March 31, 1980)..... 9

STATE

Cal. Bus. & Prof. Code §17200 7

California Civil Code §1671 2

Del. Code Ann. tit. 5, §950 ..... 2, 7

BANKING AGENCY OPINION LETTERS

FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992) 10

FDIC Opinion No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,635 (July 12, 1993) 18

OCC Interpretive Ltr. No. 452, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988) 10

TABLE OF AUTHORITIES – Continued

Page

OCC Interpretive Ltr. No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,618 (Feb. 17, 1995) 10

Letter of William P. Bowden, Jr., OCC Chief Counsel, 1992 WL 136390 (OCC) (Feb. 4, 1992) 10

OTHER MATERIALS

60 Fed. Reg. 11924, 11940 (March 3, 1995) 10

Black's Law Dictionary (5th ed. 1979) at p. 729 10

Credit Card Management, Card Industry Directory: *The Blue Book of the Credit and Debit Card Industry in the United States,* 1996 ed 16

Dunkelberg, "Litigation Concerning Late Charges is Major Threat to Credit Card Business," Banking Policy Report (April 6, 1992) 14

DRI/McGraw Hill, *A Study of Employment, Regulations and the Credit Card Industry* (Feb. 1993) 14

The New York Times, Feb. 23, 1992 at A1, "Suits Pushing Banks to Obey State Laws on Credit Card Fees" 15

OPINIONS BELOW

The Order of the California Supreme Court dismissing review is published as *Harris v. Chase Manhattan Bank, N.A.*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. Nov. 2, 1995) and is reprinted in Petitioner's Appendix at A-34. The Order of the California Supreme Court which previously granted review is published as *Harris v. Chase Manhattan Bank, N.A.*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. Feb. 23, 1995) and is reprinted in the Petitioner's Appendix at A-33. The opinion of the Court of Appeal appears at *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994) and is reprinted in the Petitioner's Appendix at A-20 to A-32. The order of the trial court is not reported and is reprinted in the Petitioner's Appendix at A-18 to A-20.

JURISDICTION

The California Supreme Court entered its judgment on November 2, 1995. The petition was filed and docketed on December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at page 3 of the petition.

Section 85 of the National Bank Act, 12 U.S.C. §85, is set out, in pertinent part, at pages 3-4 of the petition.

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), provides in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions . . . such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located . . .

Section 950 of Title 5 of the Delaware Code is set out at page 6 of the petition.

Section 1671 of the California Civil Code is set out at pages 4-5 of the petition.

STATEMENT OF THE CASE

A. INTRODUCTION

Respondents The Chase Manhattan Bank (USA) and The Chase Manhattan Bank, N.A. submit this Brief to express their agreement with petitioner that the Court should grant a writ of certiorari to resolve a direct conflict between the Supreme Courts of California and Colorado and the First and Third Circuit Courts of Appeals, on the one hand, and the New Jersey Supreme Court, on the other, on a federal banking law issue of enormous importance to federally-insured depository institutions throughout the country.

The First and Third Circuits and the highest courts of California and Colorado have held that the term "interest" in Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d, and/or Section 85 of the National Bank Act ("NBA"), 12 U.S.C. §85, encompasses not only percentage-based periodic rates, but also flat late charges. *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994) (Section 27 and Section 85), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995); *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 at *56 to *68 (3d Cir. Dec. 29, 1995) (Section 85); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) (Section 27), *cert. denied*, 113 S. Ct. 974 (1993); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995) (Section 85), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995); *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) (Section 27); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995) (Section 85), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) (Section 85).

However, the Supreme Court of New Jersey has expressly disagreed with the foregoing rulings, and instead has held that the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA is limited to percentage-based periodic rates. *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov.

28, 1995) (Section 27), *petition for certiorari pending*, No. 95-963 (U.S. Dec. 18, 1995); *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995) (Section 85), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995).

Unlike any of the other cases now pending before this Court, this case involves *both* Section 85 of the NBA *and* Section 27 of the FDIA. For the first two years of the four-year period covered by the Complaint, Respondent The Chase Manhattan Bank (USA) ("Chase") was a national bank governed by Section 85 of the NBA. For the remaining two years of the relevant period, Chase was a federally-insured state bank governed by Section 27 of the FDIA.

Certiorari is warranted not only because of the conflicts in the courts below, but also because of the profound national importance of the federal banking law issue involved. This Court has never construed the term "interest" in Section 27 of the FDIA and Section 85 of the NBA or the other two similarly-worded banking statutes (12 U.S.C. §1463(g) and 12 U.S.C. §1785(g)), and the proper interpretation of these statutes is of critical importance since they govern all types of intrastate and interstate lending by national banks and federally-insured state banks, savings associations, and credit unions. Indeed, the proper interpretation of "interest" is necessary to ensure the continued vitality of the "most favored lender" doctrine enunciated by this Court over a century ago in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), which mandates that national banks and federally-insured state banks be afforded competitive equality with other lenders located in the same state.

This case may affect the interstate exportation not just of late charges, but also other fees customarily imposed by credit card issuers and other lenders, such as annual fees, overlimit fees, and cash advance fees. This case has nationwide significance since numerous states' laws prohibit or limit late charges and other of the foregoing fees. Moreover, with over $3 billion in fee revenue (*i.e.*, revenue not derived from periodic finance charges) collected each year by credit card issuers, the federal banking law issue presented here has enormous ramifications for the entire credit card industry. It will determine credit card issuers' potential liability for transactions completed in prior years, and will also affect their current and future lending practices. The resolution of this issue will also have a major impact on other types of intrastate and interstate lending as well.

Given the tremendous disruption and uncertainty for the banking industry, federal banking agencies, state legislatures and borrowers that has been created by the direct conflicts in the courts below, it is vital that guidance be provided by this Court.

B. FACTUAL BACKGROUND

Until June 21, 1990, The Chase Manhattan Bank (USA) ("Chase") was a national banking association chartered by the Comptroller of the Currency ("OCC") and located in Delaware. Since that time, it has been a

federally-insured state-chartered bank located in Delaware. (A-21).[1]

As part of its banking services, Chase issues VISA and MasterCard credit cards, pursuant to which it lends money on an open-end credit basis to borrowers throughout the United States. The terms and conditions governing the use of the credit cards are set forth in the written Agreement provided to cardmembers when they receive their cards.

Petitioner is a California citizen who holds a Chase MasterCard. He has challenged a provision in the cardmember agreement authorizing Chase to impose a $10 late charge if the cardmember fails to make timely payment of the required minimum monthly balance. Chase imposes its late charge on an interstate basis in reliance upon Section 27 of the FDIA, which authorizes a federally-insured state bank to charge "interest" on its loans at "the rate allowed by the laws of the State . . . where the bank is located," and expressly provides that any contrary law in the borrower's State "is hereby preempted." For the period when Chase was a national bank, it imposed its late charge on an interstate basis in reliance upon Section 85 of the NBA, which authorizes a national bank to charge "interest" on its loans "at the rate allowed by the laws of the State . . . where the bank is located . . . " Chase is located in Delaware, whose laws

---

[1] Respondent The Chase Manhattan Bank, N.A. is a nominal defendant in this case, inasmuch as it was stipulated below that it did not issue any credit cards during the relevant time period.

authorize the imposition of any late charge agreed to between a borrower and a lender. Del. Code Ann., Title 5, §950.

C. PROCEDURAL HISTORY

Petitioner Leslie Harris filed this putative class action on March 6, 1992 on behalf of himself and all other California residents who had been issued a VISA or MasterCard credit card by Chase and were assessed a late charge. He alleged that the late charge constituted a liquidated damages penalty in violation of Section 1671 of the California Civil Code and also violated the California Unfair Trade Practices Act, Cal. Bus. & Prof. Code §§17200 *et seq.* (A-1 to A-17).

This case is one of numerous class actions filed around the country against the nation's leading credit card issuers in the wake of a decision by a District Court in Massachusetts holding that late charges are not "interest" under Section 27 of the FDIA and that Massachusetts' statutory prohibition of late charges was not preempted. *Greenwood Trust Co. v. Massachusetts*, 776 F.Supp. 21 (D. Mass. 1991). However, after this case and the many others like it were commenced, the Court of Appeals for the First Circuit unanimously reversed the District Court's decision, and this Court denied Massachusetts' Petition for a Writ of Certiorari. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

On February 3, 1993, the trial court granted Chase's general demurrer to the Amended Complaint on the

ground that petitioner's claims were preempted by Section 27 of the FDIA (for the time period since Chase became a federally-insured state bank) and Section 85 of the NBA (for the time period when Chase had been a national bank).[2] (A-18 to A-20).

On November 17, 1994, the California Court of Appeal unanimously affirmed the order of dismissal, holding that petitioner's claims were preempted by Section 27 of the FDIA and Section 85 of the NBA. *Harris v. Chase Manhattan Bank N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994) (A-20 to A-32).

The Court of Appeal expressly agreed with the reasoning of the First Circuit Court of Appeals in *Greenwood Trust v. Massachusetts*, and held that Section 27 of the FDIA and Section 85 of the NBA "preempt contrary state laws regulating late charges and other flat fees in connection with credit card lending." 34 Cal. App.4th at 1571. The Court held that "given the unmistakable intent of Congress to level the playing field and create lending parity between state and national banks" when Section 27 of the FDIA was enacted in 1980, along with the fact that Section 27 "borrowed language extensively from section 85," the term "interest" in both statutes should be interpreted the same way. *Id.* at 1570, 1574. The Court cited numerous cases demonstrating that "even before the

---

[2] Petitioner's claims covered a four-year period from March 6, 1988 to the date the complaint was filed, March 6, 1992. (A-4). As stated above, Chase converted from a national bank to a state bank in June, 1990.

enactment of section 521 [Section 27 of the FDIA],[3] federal courts had consistently construed the term 'interest' in section 85 to embrace not only periodic percentage rates but a host of other fees incidental to the loaning or forbearance of money."[4] *Id.* at 1571-1572. The Court reasoned as follows:

> In lifting section 85's language and engrafting it onto section 521, Congress is presumed to have been aware of prior judicial decisions interpreting the older statute (*Holmes v. SIPC* (1992) ___ U.S. ___ [117 L.Ed.2d 532, 543-544, 112 S. Ct. 1311, 1317-1318]), including the courts' sweeping construction of the term 'interest.' . . . Viewed from this historical perspective, Congress's intent to define 'interest' in the broadest sense for preemption purposes could not be more clear. 34 Cal. App. 4th at 1572.

The Court of Appeal accorded deference to the views of the OCC and Federal Deposit Insurance Corporation ("FDIC"), which have opined that late charges are within

---

[3] Section 27 of the FDIA originated as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (March 31, 1980).

[4] Similarly, in the Third Circuit's very recent decision in *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 at *63-*64 (3d Cir. Dec. 29, 1995), the Court cited numerous older precedents demonstrating that "the significant weight of authority" comports with an expansive definition of "interest" in Section 85, and these cases "recognize that various loan charges often are substantively similar in their economic function to the periodic percentage rates casually termed 'interest.' "

the preemptive scope of Section 85 of the NBA and Section 27 of the FDIA, respectively.[5] *Id.* at 1571. the Court also stated that late charges fall within the dictionary definition of "interest" as "compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." *Id.* at 1573 n. 2, quoting *Black's Law Dictionary* (5th ed. 1979) p. 729. The Court explained that "[t]he cardholder who is late in tendering the minimum monthly payment enjoys use of that money in the meantime and the late charge compensates the lender for such forbearance." 34 Cal. App. 4th at 1573 n. 2.

On February 23, 1995, the California Supreme Court granted review of the Court of Appeal's decision. 889 P.2d 540, 38 Cal.Rptr.2d 346. (A-33). However, on November 2, 1995, after the California Supreme Court rendered its decision in favor of the defendant bank in *Smiley v. Citibank, supra,* it dismissed its prior order of review

---

[5] The FDIC has specifically concluded that credit card late charges imposed by federally-insured state banks are "interest" under Section 27 of the FDIA. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992). The OCC likewise has opined on several occasions that credit card late charges are "interest" under Section 85 of the NBA. OCC Interpretive Ltr. No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995); Letter from William P. Bowden, Jr., OCC Chief Counsel, 1992 WL 136390 (OCC) (Feb. 4, 1992); OCC Interpretive Ltr. No. 452, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (Aug. 11, 1988). *See also* 60 Fed. Reg. 11924, 11940 (March 3, 1995) (proposed OCC Interpretive Ruling stating that late charges are "interest" under Section 85).

in this case as improvidently granted. 905 P.2d 417, 46 Cal.Rptr.2d 748. (A-34).

ARGUMENT

A. There Exists a Direct Conflict in the Courts Below Concerning the Meaning of "Interest" in Section 27 of the FDIA and Section 85 of the NBA

Chase agrees with petitioner that this Court should grant a writ of certiorari to resolve a sharp and direct conflict in the courts below concerning the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA. This case involves *both* of those statutes.

The highest courts of California and Colorado, along with the First and Third Circuit Courts of Appeals, have all held that late charges are "interest" for purposes of Section 27 of the FDIA and/or Section 85 of the NBA. *See* p. 3, *supra*. However, the New Jersey Supreme Court rendered a contrary holding in *Hunter v. Greenwood Trust Co.* (Section 27) and *Sherman v. Citibank* (Section 85). Moreover, other cases involving the issue of whether credit card late charges are "interest" under the federal banking statutes are pending in other jurisdictions and also have reached conflicting conclusions.[6]

---

[6] A lower court held that credit card late charges are "interest" under Section 85 of the NBA in *Tikkanen v. Citibank, N.A.*, 801 F.Supp. 270 (D. Minn. 1992). The only court besides the New Jersey Supreme Court to conclude that credit card late charges are not "interest" under federal law is the intermediate

The pressing need for Supreme Court resolution of the conflicts in the courts below is vividly illustrated by the sharp conflicts now existing within the Third Circuit itself regarding the question of whether late charges are "interest" under Section 85 of the NBA and Section 27 of the FDIA. Although the Third Circuit has answered that question in the affirmative, directly contrary decisions were previously rendered by the New Jersey Supreme Court and by the intermediate appellate court in Pennsylvania. *See* n. 6, *supra*.

Thus, for banks and borrowers who are located in or doing business in New Jersey and Pennsylvania, the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA turns solely on the happenstance of whether suit is brought in federal court or state court. By the same token, national credit card issuers such as Chase are also confronted with conflicts on a national level concerning the legality of their interstate exportation of late charges – while that practice has been judicially approved by the First Circuit, Third Circuit, and the highest courts of California and Colorado, it has been

---

appellate court in Pennsylvania, and that court's decision has been granted review by the Pennsylvania Supreme Court. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending). In addition to the foregoing cases, there are many other cases pending around the country against credit card issuers in which published decisions have not been rendered.

declared illegal by the New Jersey Supreme Court and Pennsylvania intermediate appellate court.

When this Court denied certiorari in *Greenwood Trust v. Massachusetts* in January, 1993 (113 S. Ct. 974), the issue was still one of first impression in the appellate courts and no conflicts had yet arisen. However, the cases spawned by the reversed District Court decision in *Greenwood Trust v. Massachusetts* have now proceeded through various state Supreme Courts, and a stark conflict has arisen that can be resolved only by this Court. The New Jersey Supreme Court decisions against the banks, like the District Court decision in *Greenwood Trust v. Massachusetts*, undoubtedly will give rise to many more class action lawsuits around the country against federally-insured depository institutions, and these cases will impose substantial burdens and expenses upon the parties and the courts. Unless certiorari is granted now, the conflicting interpretations of the federal banking statutes surely will persist and multiply. These conflicting rulings already have created considerable turmoil and uncertainty for the nation's banking industry and exposed it to potentially enormous damage claims. The longer the conflicts are allowed to continue, the greater the harm that will be inflicted upon the countless lenders and borrowers[7] who participate in the country's multi-billion dollar interstate lending market.

---

[7] As a result of the New Jersey Supreme Court's rulings, various federally-insured depository institutions may refrain from imposing late charges on delinquent customers in states that prohibit or limit those charges. Lacking late charges as a means to recoup the significant losses caused by the delinquent

B. The Interpretation of the Meaning of "Interest" in Section 27 of the FDIA and Section 85 of the NBA Has Profound National Importance

Beyond the conflicts discussed above, there can be no doubt about the tremendous legal and economic importance of the federal question presented by this case. This Court has not yet rendered any opinions construing the meaning of the term "interest" in Section 27 of the FDIA, Section 85 of the NBA or the nearly identically-worded statutes applicable to federally-insured savings associations (12 U.S.C. §1463(g)) and federally-insured credit unions (12 U.S.C. §1785(g)). Since the courts and federal banking agencies have held uniformly that "interest" carries the same meaning in all of these statutes, resolution of the question presented in this case will have significant ramifications for all federally-insured depository institutions.

Twenty-six states have laws that prohibit or restrict late charges,[8] and therefore the construction of the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA will affect the imposition of late charges not just in California, but throughout the country. Also, even though late charges are the only fees directly at issue in

---

cardholders, credit card issuers may have to raise periodic interest rates for all customers, and may also constrict the availability of credit for individuals of lesser means who are most likely to become delinquent. *See* Dunkelberg, "Litigation Concerning Late Charges is Major Threat to Credit Card Business," Banking Policy Report (April 6, 1992).

[8] DRI/McGraw Hill, *A Study of Employment, Regulations and the Credit Card Industry* at Table 3, pp. 16-18 (Feb. 1993).

this case, the interpretation of the meaning of "interest" in the federal banking laws will affect numerous other fees and charges customarily imposed in connection with credit card loans (*e.g.*, annual fees, overlimit fees, and cash advance fees). Like late charges, these fees have long been "exported" throughout the country by credit card issuers from their home states notwithstanding myriad prohibitions or limitations on these fees in many borrowers' states because they were considered to be charges for the use, forbearance or detention of money that are encompassed within the preemptive scope of the federal banking statutes.[9]

In *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), this Court unanimously held that Section 85 authorized a national bank to "export" the interest allowed by the laws of its home State to credit cardholders in other states with more restrictive usury limits. This Court stressed in *Marquette* that if the meaning of the term "located" in Section 85 of the NBA "were to depend on the whereabouts of each credit-card transaction," this would "throw into confusion the complex system of modern interstate banking." *Id.* at 312. By the

---

[9] According to *The New York Times*, "half the states in the country have laws limiting or banning credit card fees for late payments, for annual renewals and for exceeding credit limits." *New York Times*, February 23, 1992 at A1, "Suits Pushing Banks to Obey State Laws on Credit Card Fees." This article includes a chart listing the many states that prohibit late fees, limit late fees, prohibit fees for exceeding a line of credit, and limit annual fees. Although this chart does not reflect legislative changes in a few states since 1992, it nonetheless demonstrates that the issue presented by this case has nationwide repercussions.

same token, if the legality of the late charge imposed by a national credit card issuer such as Chase were to depend on the residence of the cardholder or the whereabouts of each credit-card transaction, the complex system of modern interstate banking would become balkanized and thrown into confusion.

The economic implications of the issue presented here are staggering. According to the most recently available statistics, in 1994 alone the credit card industry received approximately $2.1 billion in revenues from late fees, overlimit fees, and other similar fees; $1.7 billion in annual fees; and $1.3 billion in cash advance fees. Credit Card Management, Card Industry Directory: *The Blue Book of the Credit and Debit Card Industry in the United States,* 1996 ed. at p. 18. The numerous class actions currently pending throughout the country against federally-insured depository institutions that were precipitated by the later-reversed District Court opinion in *Greenwood Trust v. Massachusetts* seek hundreds of millions of dollars in damages under various state consumer protection laws, which typically have statutes of limitation that permit suit for several years of transactions. These lawsuits, along with the new class actions that certainly will be inspired by the New Jersey Supreme Court decisions, may pose a threat to the safety and soundness of the nation's leading financial institutions. Indeed, in an *amicus curiae* brief the FDIC filed in the First Circuit in the *Greenwood Trust v. Massachusetts* case, the agency cautioned that the credit card late charge class actions could "jeopardize the financial integrity of all FDIC-insured institutions."

The meaning of "interest" in the federal banking statutes affects not only credit card lending, but all types of lending. For example, if "interest" were to be construed narrowly to encompass only percentage-based periodic rates, a flat origination fee for a loan might no longer be considered "interest" as a matter of federal law. Also, many states allow flat minimum finance charges on open-end credit, and even though such finance charges clearly constitute "interest," they may not qualify as "interest" under federal banking law if that term is defined in the restrictive manner adopted by the New Jersey Supreme Court. Similarly, flat late charges imposed in connection with home equity loans, automobile loans, and commercial loans would not be "interest" either.

Although this case involves an interstate loan transaction, the construction of the term "interest" will also have a significant impact on intrastate lending by federally-insured depository institutions, since Section 27 of the FDIA and Section 85 of the NBA govern both interstate and intrastate loans. The federal courts and banking agencies have long interpreted "interest" in an expansive manner to include various fees and charges in order to effectuate the "most favored lender" doctrine enunciated by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), and reiterated a century later in *Marquette*, 439 U.S. at 314 and n. 26. This doctrine provides that, to ensure competitive equality for federally-insured depository institutions and safeguard them from "the hazard of unfriendly legislation by the states," *Tiffany*, 85 U.S. at 413, they are empowered to charge whatever "interest" the "most favored lender" in the

same State is permitted to charge.[10] Federally-insured depository institutions have long relied on the "most favored lender" doctrine in order to "borrow" the more favorable lending authority often bestowed upon other lenders (*e.g.*, credit unions, consumer finance companies, second mortgage loan companies) located in the same State.

If "interest" in Section 27 of the FDIA and Section 85 of the NBA is construed not to include flat fees such as late charges, states may claim a basis for enacting laws enabling certain favored lenders to charge such fees while denying that same right to federally-insured depository institutions, who will no longer be able to invoke the "most favored lender" doctrine to "borrow" the right to charge those fees. This is precisely the type of discrimination against federally-insured depository institutions that the doctrine was intended to prevent.

Indeed, in the Third Circuit's recent decision holding that late charges are "interest" under Section 85 of the NBA, the Court stressed "[t]he most favored lender doctrine and the exportation principle apply to all of a

---

[10] Although the "most favored lender" doctrine originally applied only to national banks, the courts and the FDIC have uniformly recognized that, by incorporating the language of Section 85 of the NBA into Section 27 of the FDIA in 1980, Congress conferred "most favored lender" status on federally-insured state banks as well. *Greenwood Trust v. Massachusetts*, 971 F.2d at 826-827; *Smiley v. Citibank*, 11 Cal. 4th at 159; *Hunter v. Greenwood Trust Co.*, 1995 N.J. LEXIS 1354 at *13-*14; *Vanderweyst v. First State Bank*, 425 N.W.2d 803, 806 (Minn.), *cert. denied*, 488 U.S. 943 (1988); FDIC Opinion No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,635 (July 12, 1993).

national bank's charges for the use of its money, and the term 'interest' must have a correspondingly broad reach in order to assure parity between national banks and other state lenders." *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 at *62 (3d Cir. Dec. 29, 1995). The Third Circuit explained that an unduly narrow definition of "interest" would eviscerate the "most favored lender" doctrine:

> A narrower definition would allow states to permit certain favored lenders to assess these charges while denying national banks the same privilege. As Amici for the banks argued in their brief, applying Section 85 only to periodic percentage rates would lead to an unworkable and undesirable hodgepodge of fee limits, and periodic rate provisions, under the laws of both the bank's state and the borrower's state. States often allow lenders to utilize a variety of credit card charges as an integrated package. The Supreme Court noted this point in *Marquette*, 439 U.S. at 302-03, in which it discussed a Nebraska law that set higher percentage rates than did Minnesota law. The Court observed, 'To compensate for the reduced [annual rate of] interest, Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card.' *Id.* Some states could, for example, decide to limit lenders' use of late fees if those lenders are also imposing certain periodic rates. [Plaintiff's] interpretation could therefore result in a borrower in one of these states being subject to the periodic percentage rate limits but not to the limits on other loan charges as well.

Spellman v. Meridian Bank (Delaware), supra, 1995 U.S. App. LEXIS 37149 at *62-*63.[11]

Given the conflicts in the courts below and the enormous sums of money involved, thousands of federally-insured depository institutions throughout the country now find themselves in a difficult quandary as to how to proceed with respect to their credit card and other lending programs. Settled and long-unchallenged interstate and intrastate lending practices have been dramatically disrupted, and a cloud of uncertainty now exists over the legality of billions of dollars in fees and charges collected over the years by credit card issuers and other lenders.

The federal banking law issue presented here affects the entire banking industry, tens of millions of credit card customers, the usury laws of numerous states, and many opinions rendered by the federal banking agencies. Given

---

[11] Similarly, the California Supreme Court emphasized that the "most favored lender" doctrine compels a broad definition of "interest:"

> If 'interest' were not read as indicated above [to include late fees], the purpose of facilitating a national banking system by granting national banks 'most favored lender' status in their home states could be frustrated by unfriendly state legislation. Thus, a state could allow periodic percentage charges payable absolutely by maturity for all lenders, *including national banks,* but fix them at a rate so low that they could lend only at a loss. It might then allow late payment fees to some lenders, *not including national banks,* at a level high enough that *they* could lend at a profit. Such a result would be untenable.

Smiley v. Citibank (South Dakota), supra, 11 Cal. 4th at 154 (emphasis in original).

the enormous legal and economic importance of the issues that are presented by this case, Chase agrees with petitioner that certiorari is necessary to provide much-needed guidance to everyone concerned.

CONCLUSION

For the reasons set forth above, Chase agrees with petitioner that this Court should issue a writ of certiorari in this case.

Respectfully submitted,

ALAN S. KAPLINSKY
BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

ARTHUR R. MILLER
(Counsel of Record)
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

Counsel for Respondents

No. 95-951

(3)

Supreme Court, U.S.
FILED
JAN 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

LESLIE U. HARRIS,

Petitioner,

v.

CHASE MANHATTAN BANK, N.A. and DOES 1 THROUGH 50,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

AMICI CURIAE BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN J. GILL III
(Counsel of Record)
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5026

ROBERT E. MCKEW
AMERICAN FINANCIAL SERVICES ASSOCIATION
919 18th Street, N.W.
Suite 300
Washington, DC 20006
(202) 296-5544

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
30th Floor
Arlington, VA 22209-3908
(703) 276-1750

18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Certiorari Should Be Granted to Resolve a Direct Conflict Between the New Jersey Supreme Court's Decision and Those of the First Circuit, Third Circuit, and Supreme Courts of California and Colorado 4

II. The Meaning of the Term "Interest" in Section 27 of the FDIA and Section 85 of the NBA Is An Issue of Substantial Importance 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Hiatts, 82 U.S. (15 Wall.) 177 (1872) 11

In re: Citibank (South Dakota) Credit Card Litigation, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995) 5

Copeland v. MBNA America Bank, N.A., No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995) 6

FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 8

Gadon v. The Chase Manhattan Bank (USA), 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending) 5

Greenwood Trust Co v. Massachusetts, 776 F.Supp. 21 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) 5, 9, 12

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995) 5

Hunter v. Greenwood Trust Co., No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-963 (U.S. Dec. 18, 1995) ..4, 12

Marquette National Bank v. First of Omaha Corp., 439 U.S. 299 (1978) 8, 9, 10

Mazaika v. Bank One, Columbus, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995) 5

TABLE OF AUTHORITIES – Continued

Page(s)

NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 115 S. Ct. 810 (1995) 8

Richardson v. Citibank (South Dakota), N.A., No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) 6

Sherman v. Citibank (South Dakota), N.A., No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995) 5

Smiley v. Citibank (South Dakota), N.A., 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995) 5, 10, 12

Spellman v. Meridian Bank (Delaware), Nos 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) 5, 9, 10, 11

Stoorman v. Greenwood Trust Co., No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) 6

Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1874) 11

STATUTES AND RULES

12 U.S.C § 85 ..... *passim*

12 U.S.C § 1463(g) 2, 7, 12

12 U.S.C § 1785(g) 2, 7, 12

12 U.S.C § 1831d ..... *passim*

Supreme Court Rule 10(b) 4

TABLE OF AUTHORITIES – Continued

Page(s)

MISCELLANEOUS

42 Fed. Reg. 11,924 (March 3, 1995) 7

Card Industry Directory (Faulkner & Grey 1996) at 18 9

BANKING AGENCY OPINION LETTERS

FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992) 6, 12

OCC Interpretive Letter No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,618 (Feb. 17, 1995) 6, 7

Letter of Harry W. Quillian, FHLBB Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 at p. 62,403 (June 27, 1986) 7

Letter of Richard S. Schulman, Acting Assoc Gen Counsel, NCUA, 62 Banking Rep. (BNA) 766 (Apr. 11, 1994) 7

Letter of Karen Solomon, OTS Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 (Sept. 29, 1994) 7

This amici curiae brief is filed by the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), and the Consumer Bankers Association ("CBA") in support of the issuance of a writ of certiorari in this case. The ABA, AFSA and CBA agree with Petitioner and Respondents The Chase Manhattan Bank (USA) and The Chase Manhattan Bank, N.A. (collectively referred to hereafter as "Chase") that a writ of certiorari should be granted in this case. Petitioner and Respondents have each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

The ABA is the largest national trade association of the commercial banking industry in the United States. It represents banks of all types and sizes: national banks and state-chartered banks; money center, regional and community banks; and both independent banks and banks owned by bank holding companies. There are ABA member banks in each of the 50 states and in the District of Columbia. In the aggregate, ABA member banks represent approximately 90 percent of the domestic assets of all American commercial banks.

The AFSA represents over 300 companies operating more than 10,000 offices that are engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned finance companies to the nation's largest financial services, retail and automobile companies. AFSA also represents numerous depository institutions.

The CBA was founded in 1919 to represent retail banks nationwide. Today, it represents approximately 750 bank holding companies, banks and thrift institutions that represent nearly 80 percent of all consumer credit held by federally-insured depository institutions. The CBA focuses on retail issues, including deposit, investment, and lending products and services. Its membership includes bank holding companies, regional, super-regional, and money center banks, thrifts, and credit unions.

The meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d, and Section 85 of the National Bank Act ("NBA"), 12 U.S.C. § 85,[1] has significance not only to Amici's members who are federally-insured state banks or national banks, but also to other federally-insured depository institutions as well. The language of Section 27 of the FDIA and Section 85 of the NBA is virtually identical to that of Section 4(g) of the Home Owners' Loan Act, 12 U.S.C. § 1463(g), applicable to federally-insured savings institutions, and Section 205(g) of the Federal Credit Union Act, 12 U.S.C. § 1785(g), applicable to federally-insured credit unions. Since the courts and federal banking agencies have uniformly held that the term "interest" has the same meaning in all of these statutes, this case is very important to all of Amici's members.

---

[1] Since Respondent The Chase Manhattan Bank (USA) was a national bank for part of the period of time covered by the Complaint in this case and a federally-insured state bank for the remainder of the period, this case involves *both* Section 27 of the FDIA and Section 85 of the NBA.

Also, Amici have a strong interest in this case because the interpretation of the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA affects not just credit card lending, but all types of lending. Moreover, this case has profound implications for both interstate lending and intrastate lending by the Amici's members.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve a direct conflict between the New Jersey Supreme Court, which held that late charges are not "interest" under Section 27 of the FDIA and Section 85 of the NBA, and the United States Courts of Appeals for the First Circuit and Third Circuit and the Supreme Courts of California and Colorado, all of which have reached a contrary conclusion.

Resolution of the conflict in the courts below is very important because of the great uncertainty that now exists with respect to the meaning of "interest" and the legality of the interstate exportation of late fees. Numerous states have laws that prohibit or limit late charges, and credit card issuers in states that allow late charges have relied on Section 27 of the FDIA and Section 85 of the NBA for many years to export late charges to credit cardmembers throughout the country. Amici's members can no longer be sure whether their long-established interstate lending practices are permitted under federal law, and the current lack of uniformity and

predictability adversely affects both lenders and borrowers. Also, there are numerous class actions throughout the country against Amici's members involving the exportation of credit card late charges and other charges, and many more class actions are likely to be filed as a result of the New Jersey decisions that late charges are not "interest" under Section 27 of the FDIA and Section 85 of the NBA. These cases seek billions of dollars in damages, and if the New Jersey decision is followed by other courts the potential liability could be ruinous to many of Amici's members.

ARGUMENT

I. Certiorari Should Be Granted to Resolve a Direct Conflict Between the New Jersey Supreme Court's Decision and Those of the First Circuit, Third Circuit, and Supreme Courts of California and Colorado

A writ of certiorari should be granted in this case pursuant to Supreme Court Rule 10(b) because a state court of last resort has decided an important federal question in a way that directly conflicts with the decisions of two other state courts of last resort and two United States courts of appeals.

The New Jersey Supreme Court has ruled 4-3 that the term "interest" in Section 27 of the FDIA does not include flat late charges, and instead is limited to periodic percentage rates. *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-963 (U.S. Dec. 18, 1995).

It reached the same conclusion with respect to Section 85 of the NBA in a companion case involving a national bank. *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995).[2]

The New Jersey Supreme Court holding squarely conflicts with decisions by the First Circuit Court of Appeals, Third Circuit Court of Appeals, California Supreme Court, and Colorado Supreme Court, all of which have held that late charges assessed by credit card issuers *are* "interest" under Section 27 of the FDIA and Section 85 of the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995);

---

[2] Pennsylvania's intermediate appellate court has also held that late charges are not "interest" under Section 27 of the FDIA and Section 85 of the NBA. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending).

Stoorman v. Greenwood Trust Co., No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995).

As a result of the conflicts in the courts below, the determination of whether or not a particular card issuer's late charge is "interest" under Section 27 of the FDIA or Section 85 of the NBA now depends on the vagaries of where suit is brought. For instance, within the Third Circuit, a conflict exists between the Court of Appeals and the state courts of New Jersey and Pennsylvania concerning the meaning of "interest" in Section 85 of the NBA and Section 27 of the FDIA.

The New Jersey decisions conflict with statutory interpretations by all of the federal banking agencies. The Federal Deposit Insurance Corporation ("FDIC"), which is responsible for enforcing and interpreting the Federal Deposit Insurance Act, has opined that credit card late charges are "interest" under Section 27 of the Act. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992). The FDIC also expressed this opinion in *amicus* briefs it filed in the First Circuit, New Jersey Supreme Court, and Colorado Supreme Court.

The Office of the Comptroller of the Currency ("OCC") has rendered several opinions that late charges are "interest" under Section 85 of the NBA, the most recent of which was in OCC Interpretive Letter No. 670,

[1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995). The OCC has also recently proposed an Interpretive Ruling that sets forth its position that late charges are "interest" under Section 85 of the NBA. *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (March 3, 1995). Also, the OCC filed *amicus* briefs in the New Jersey, California, Colorado and Pennsylvania Supreme Courts urging them to hold that late charges are "interest" under Section 85.

As stated earlier, language virtually identical to that found in Section 27 of the FDIA and Section 85 of the NBA also appears in the statutes governing the "interest" that may be charged by federally-insured savings institutions (12 U.S.C. § 1463(g)) and federally-insured credit unions (12 U.S.C. § 1785(g)). The federal banking agencies charged with interpreting those statutes have concluded, like the FDIC and OCC, that late charges are "interest" under those statutes. *See* Letter of Karen Solomon, Office of Thrift Supervision Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 (Sept. 29, 1994) (interpreting 12 U.S.C. § 1463(g)); Letter of Harry W. Quillian, Federal Home Loan Bank Board Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 at p. 62,403 (June 27, 1986) (interpreting predecessor of 12 U.S.C. § 1463(g)); Letter of Richard S. Schulman, National Credit Union Administration Acting Associate General Counsel, 62 Banking Rep. (BNA) 766 (April 11, 1994) (interpreting 12 U.S.C. § 1785(g)).

Amici's members rely on the statutory interpretations by their regulators. This Court has made it clear that deference should be accorded to the FDIC's interpretation

of the FDIA and the OCC's interpretation of the NBA where, as is the case here, those interpretations are reasonable and fully consistent with the statutory language at issue. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995).

In light of the conflicts in the courts below, the entire banking industry is now faced with tremendous uncertainty regarding the legality under federal law of the long-standing practice of exporting late charges from states that allow such charges into those that either prohibit or restrict them. Billions of dollars are involved, and therefore it is essential to Amici's members that this Court resolve the conflicts in the courts below. As this Court emphasized in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299, 312 (1978), allowing uncertainty to exist concerning the meaning of the language used in Section 85 of the NBA (or Section 27 of the FDIA) would "throw into confusion the complex system of modern interstate banking."

II. The Meaning of the Term "Interest" in Section 27 of the FDIA and Section 85 of the NBA Is An Issue of Substantial Importance

The interpretation of the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA is an issue of substantial national importance for many different reasons.

Scores of class action lawsuits were filed around the country against the nation's leading credit card issuers following the later-reversed November, 1991 decision by

the district court in *Greenwood Trust v. Massachusetts* holding that credit card late charges are not "interest" under Section 27 of the FDIA. 776 F.Supp. 21 (D. Mass. 1991). These lawsuits seek hundreds of millions (if not billions) of dollars in damages for late charges imposed over a number of years.[3] As a result of the New Jersey Supreme Court decisions, more suits are sure to be brought in the many states that prohibit late charges altogether or limit their amounts. The enormous damages sought in these cases could cause tremendous harm to many of Amici's members.

In the Third Circuit's very recent decision holding that late charges are "interest" under Section 85 of the NBA, the Court emphasized that "applying Section 85 only to periodic percentage rates would lead to an unworkable and undesirable hodgepodge of fee limits, and periodic rate provisions, under the laws of both the bank's state and the borrower's state." *Spellman v. Meridian Bank (Delaware), supra,* 1995 U.S. App. LEXIS 37149 at *62. The Third Circuit also explained that limiting the meaning of "interest" to periodic percentage rates would dramatically alter the overall "package" of terms and fees utilized by card issuers:

> States often allow lenders to utilize a variety of credit card charges as an integrated package. The Supreme Court noted this point in *Marquette*, 439 U.S. at 302-03, in which it discussed a Nebraska law that set higher percentage rates

---

[3] In 1994 alone, the credit card industry collected approximately $2 billion in late charges. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

> than did Minnesota law. The Court observed, 'To compensate for the reduced [annual rate of] interest, Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card.' *Id.* Some states could, for example, decide to limit lenders' use of late fees if those lenders are also imposing certain periodic rates. [Plaintiff's] interpretation could therefore result in a borrower in one of these states being subject to the periodic rate limits but not to the limits on other loan charges as well.

Id. at *62-*63.

If credit card issuers are restricted in their late charge authority, they may be forced to raise their periodic interest rates to all cardholders in order to recover the losses caused by the late payers. In *Smiley v. Citibank (South Dakota)*, the California Supreme Court stated that late payment "causes various costs relating to default, including collection – costs that may be especially high when, as is typically the case in credit card transactions, the underlying loan is unsecured. Late payment fees may be employed to impose default costs on late payers, who are responsible for them, and to avoid shifting them to timely payers, who are not. Fairness is served thereby: late payment fees make late payers shoulder the burden they themselves have created." 11 Cal. 4th at 161.

Even though this case only involves late charges, the interpretation of "interest" in Section 27 of the FDIA and Section 85 of the NBA will necessarily affect the exportation of other fees and charges customarily assessed by credit card issuers, such as annual fees, cash advance fees, non-sufficient funds fees, and over-limit fees. All of

these fees have been exported throughout the country from the card issuers' states, whose laws allow such fees, notwithstanding prohibitions or limitations on such fees in a number of states where cardmembers reside. These fees, like late charges, are "interest" because they are imposed "for the use or forbearance of money, or as damages for its detention." *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872).

The interpretation of the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA will have wide-ranging repercussions, since those statutes govern all types of lending programs, not just credit card lending. Also, those statutes govern both interstate and intrastate lending by federally-insured state banks and national banks.

Insofar as intrastate lending is concerned, Amici's members have long relied on the "most favored lender" doctrine set forth in this Court's opinion in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), in order to avail themselves of the right to charge the fees permitted to the "most favored lender" located in the same State. As explained by both the Third Circuit and the California Supreme Court, if "interest" is construed narrowly to encompass only periodic percentage rates, then states could enable certain favored lenders to charge particular fees, and federally-insured depository institutions would no longer be able to borrow the right to assess such fees pursuant to the "most favored lender" doctrine. *Spellman v. Meridian Bank (Delaware)*, 1995 U.S. App. LEXIS 37149 at *62 ("A narrower definition [of 'interest'] would allow states to permit certain favored lenders to assess these charges while denying national

banks the same privilege."); *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 154 ("If 'interest' were not read as indicated above [to include fees other than periodic percentage rates], the purpose of facilitating a national banking system by granting national banks 'most favored lender' status in their home states could be frustrated by unfriendly state legislation.").[4]

Moreover, since the language of Section 27 of the FDIA and Section 85 of the NBA is almost identical to that contained in 12 U.S.C. § 1463(g) (governing federally-insured savings institutions) and 12 U.S.C. § 1785(g) (governing federally-insured credit unions), the interpretation of "interest" in Section 27 and Section 85 will affect all types of depository institutions in connection with all of their interstate and intrastate lending programs.

---

[4] Congress conferred upon federally-insured state banks the same "most favored lender" status previously enjoyed by national banks when it borrowed the language used in Section 85 of the NBA in drafting Section 27 of the FDIA in 1980. *Greenwood Trust v. Massachusetts*, 971 F.2d at 826-827; *Hunter v. Greenwood Trust Co.*, 1995 N.J. LEXIS 1354 at *13-*14; *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 159; FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

CONCLUSION

For the reasons set forth above, Amici respectfully request the Court to grant the petition for a writ of certiorari in this case.

Respectfully submitted,

JOHN J. GILL III
(Counsel of Record)
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5026

ROBERT E. MCKEW
AMERICAN FINANCIAL SERVICES ASSOCIATION
919 18th Street, N.W.
Suite 300
Washington, DC 20006
(202) 296-5544

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
30th Floor
Arlington, VA 22209-3908
(703) 276-1750

Supreme Court, U.S.
FILED
JAN 17 1996
CLERK

No. 95-951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LESLIE U. HARRIS,

Petitioner,

v.

CHASE MANHATTAN BANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF REQUEST FOR WRIT OF CERTIORARI

SHIRLEY M. HUFSTEDLER
Counsel of Record
L. RICHARD FISCHER
JAMES A. HUIZINGA
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

January 17, 1996

Attorneys for Amici Curiae

14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN STATE COURTS OF LAST RESORT IN TWO STATES AS WELL AS TWO FEDERAL COURTS OF APPEALS AND THE NEW JERSEY SUPREME COURT	4
II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page(s)

CASES

Cades v. H & R Block, Inc., 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) 3

Copeland v. MBNA America Bank, N.A., No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) 4, 5

Federal Deposit Insurance Corporation v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 6

Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n, 845 F.2d 519 (5th Cir. 1988) 2

Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) 2, 5

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346, *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), ... *passim*

Hunter v. Greenwood Trust Co.,
No. A-103-94, 1995 N.J. LEXIS 1354
(N.J. Nov. 28, 1995), *petition for cert. filed*,
64 U.S.L.W. 3439 (U.S. Dec. 18, 1995)
(No. 95-963) 5

Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) 6

NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.,
115 S. Ct. 810 (1995) 6

Richardson v. Citibank (South Dakota), N.A.,
No. 94SC670, 1995 Colo. LEXIS 767
(Colo. Dec. 18, 1995) 4, 5

Sherman v. Citibank (South Dakota), N.A.,
No. A-102-94, 1995 N.J. LEXIS 1355
(N.J. Nov. 28, 1995),
petition for cert. filed, 64 U.S.L.W. 3439
(U.S. Dec. 21, 1995) (No. 95-991) 5

Smiley v. Citibank (South Dakota), N.A., 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441,
900 P.2d 690 (1995), *petition for cert. filed*,
64 U.S.L.W. 3417 (U.S. Nov. 30, 1995)
(No. 95-860) ..... *passim*

Spellman v. Meridian Bank,
No. 94-3203, 1995 U.S. App. LEXIS 37149
(3d Cir. Dec. 29, 1995) 4, 5

Stoorman v. Greenwood Trust Co.,
No. 94SC382, 1995 Colo. LEXIS 764
(Colo. Dec. 18, 1995) 5

STATUTES

12 U.S.C. § 85 ..... *passim*

Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) ..... *passim*

RULES

S. Ct. R. 10(b) 4

OTHER AUTHORITIES

Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 6

Letter from Douglas Jones, Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 6

Proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924 (Mar. 3, 1995) 6

Card Industry Directory (Faulkner & Grey 1996) 8

The Nilson Report, Issue No. 591 (Mar. 1995) 2

The Nilson Report, Issue No. 603 (Sept. 1995) 7, 8

No. 95-951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LESLIE U. HARRIS,

Petitioner,

v.

CHASE MANHATTAN BANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF REQUEST FOR WRIT OF CERTIORARI

This amici curiae brief is filed in support of Chase Manhattan Bank, N.A. by MasterCard International Incorporated ("MasterCard") and VISA U.S.A. Inc. ("VISA"). MasterCard and VISA (collectively, "Amici") agree with Respondent and Petitioner that a writ of certiorari should be granted in *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review*

granted, 889 P. 2d 540, 38 Cal. Rptr. 2d 346, *review dismissed*, 905 P. 2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995) ("*Harris*"). Petitioner and Respondent each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

VISA and MasterCard are associations of financial institutions that license service marks for use in connection with credit cards, debit cards, automated teller machines and related financial services. As of year-end 1994, VISA and MasterCard had approximately 17,000 and 13,600 depository institution members, respectively, that collectively have issued a credit card to most adults in the United States. *The Nilson Report*, Issue No. 591 (Mar. 1995) at 8.

Amici's members that are national banks are vitally interested in the proper interpretation of 12 U.S.C. § 85 ("Section 85"), which governs the interest that may be charged on loans made by national banks. Amici's members that are state-chartered banks, federally- or state-chartered savings associations, or federally- or state-chartered credit unions, also are particularly interested in the interpretation of Section 85 because most of these federally-insured depository institutions have authority under Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (1980), to charge the same interest that national banks are authorized to charge under Section 85. *See, e.g.*, *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 830 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (Section 521) ("*Greenwood Trust*"); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (Section 522).

The discussion below focuses on the importance of this case for the credit card industry because *Harris* deals with

credit card loans. However, Section 85 and Sections 521 through 523 of DIDA are not limited to credit card programs; they apply to all types of retail and commercial loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) (tax refund anticipation loans). Thus, the principle at issue in this case is critically important for virtually every lending function of the banking industry.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve an irreconcilable conflict between the California and Colorado Supreme Courts and the United States Courts of Appeals for the First and Third Circuits on the one hand and the New Jersey Supreme Court, on the other hand, on the important federal question of whether late fees are interest for purposes of Section 85 and Section 521 of DIDA. Immediate resolution of this issue is urgently needed to reestablish the uniform national rule that the federal government established for the national banking system, but that was not followed by the New Jersey Supreme Court.

Prompt review by this Court is imperative because uncertainty regarding the permissibility of late charges assessed with respect to billions of dollars of credit will adversely affect both the ability of borrowers to obtain credit and the national economy. Resolution of this issue also significantly affects the extraordinary liability plaintiffs seek to impose on Amici's members that have collected late fees permitted by federal law, but not the law of the borrower's state.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN STATE COURTS OF LAST RESORT IN TWO STATES AS WELL AS TWO FEDERAL COURTS OF APPEALS AND THE NEW JERSEY SUPREME COURT.

Review on a writ of certiorari is proper in this case because a state court of last resort has decided a federal question in a way that directly conflicts with the decisions of state courts of last resort in two other states and two federal Courts of Appeals. *See* Sup. Ct. R. 10(b).

Late fees charged by a national bank on credit card loans were held to be interest for purposes of Section 85 by the California Supreme Court in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for cert. filed*, 64 U.S.L.W. 3417 (U.S. Nov. 30, 1995) (No. 95-860) (*"Smiley"*), by the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) ("*Copeland*"), and *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) ("*Richardson*"), and by the United States Court of Appeals for the Third Circuit in *Spellman v. Meridian Bank*, No. 94-3203, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) ("*Spellman*").

Similarly, late fees assessed on credit card loans by a state-chartered bank were held to be interest for purposes of Section 521 of DIDA by the United States Court of Appeals for the First Circuit in *Greenwood Trust*, by the Colorado Supreme Court in *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) ("*Stoorman*"), and by the California Court of Appeal in *Harris*.

The *Smiley*, *Copeland*, *Richardson*, *Spellman*, *Greenwood Trust*, *Stoorman* and *Harris* decisions persuasively and correctly explain why both Section 85 and Section 521 of DIDA apply to late fees. Nonetheless, the New Jersey Supreme Court held in *Hunter v. Greenwood Trust Company*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 18, 1995) (No. 95-963) *("Hunter")* and in *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 21, 1995) (No. 95-991) ("*Sherman*"), that late fees on credit card loans are not covered by Section 85 and Section 521 of DIDA because those statutes apply only to periodic percentage rate charges assessed on outstanding loan balances.

This conflict on the proper interpretation of Section 85 and Section 521 of DIDA is most acute in New Jersey. As a result of the Third Circuit's decision in *Spellman*, federal courts in New Jersey will recognize that late fees are interest under Section 85 and Section 521. However, state courts in New Jersey must follow the New Jersey Supreme Court's decisions in *Sherman* and *Hunter*, which are in direct conflict with *Spellman*.

Without resolution by this Court of the conflict on this critical issue, the scope of federal interest authority under Section 85 and Section 521 will vary depending on the state

in which a bank's borrowers reside. Such a result would be inconsistent with the principle in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that Section 85 applies on the basis of the national bank's location and not the borrower's residence.

Not only does the New Jersey Supreme Court's interpretation of Section 85 and Section 521 of DIDA conflict with decisions from the California and Colorado Supreme Courts and the First and Third Circuits, it also conflicts with the interpretation of the federal agencies charged with interpreting these federal statutes. The Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation ("FDIC") have stated repeatedly that credit card late fees are covered by Section 85 and Section 521, respectively. *See, e.g.*, Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 (reaffirming and restating the OCC's long-time position); Letter from Douglas Jones, FDIC Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534.

In addition, as part of the OCC's general revisions to its interpretive rules, the OCC has proposed to codify its position that late fees are "interest." *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (Mar. 3, 1995). Nonetheless, the New Jersey Supreme Court refused to grant to the interpretations of the federal agencies the deference called for by this Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995) and *Federal Deposit Insurance Corporation v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986).

The resolution by this Court of the central and fundamental federal question of whether Section 85 and

Section 521 of DIDA apply to late fees is urgently needed now. There is no dispute that the late fees assessed by national and state banks in numerous pending lawsuits are permissible if Section 85 and Section 521 apply. A conclusive answer from this Court that late fees are interest thus will resolve those lawsuits, and avoid unnecessary, repetitive, costly, and disruptive additional litigation. Immediate resolution of the conflict on this issue also is essential to enable national and state banks to know what law applies to the late fees they charge on the billions of dollars of credit now being extended to borrowers, and to ensure that the national banking system functions effectively and efficiently.

II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE.

Financial institutions in the United States regularly extend enormous amounts of credit on credit card accounts. The outstanding balances on VISA and MasterCard credit cards issued in the United States alone exceeded $275 billion at mid-year 1995. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Amici's members which extend the hundreds of billions of dollars of credit must be able to determine whether late fees are included in the federal interest authority provided by Section 85 and Section 521, since late fees constitute a significant component of credit card pricing. Absent such guidance, banks cannot know whether their lending charges comply with applicable fee limitations. If they guess wrongly, they are exposed to tens, if not hundreds, of millions of dollars of liability for imposing excess fees.

The late fee itself is a very important price component of credit card loans. That fee facilitates the fair and efficient administration of credit card programs; it allows card issuers "to impose default costs on late payers, who are responsible

for them, and to avoid shifting [such costs] to timely payers, who are not." *Smiley*, 11 Cal. 4th at 161. In addition, late fees constituted a majority of the estimated $2.1 billion in miscellaneous fees (namely, fees other than periodic finance charges, annual fees and cash advance fees) that were collected by bank card issuers in 1994. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

This issue already has generated a significant amount of complicated, time-consuming, and expensive litigation. Over forty-five class action lawsuits and state enforcement actions have been filed across the country since November 1991 challenging whether Section 85 or Section 521 applies to late fees on credit card loans. To date, such cases have been filed in Alabama, California, Colorado, Maine, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, and Wisconsin. In many instances, the plaintiffs' theories of state law violations could result in recoveries of a multiple of the allegedly excessive late fees, or even forfeiture of all charges (including periodic finance charges). Prompt resolution of the scope of Section 85 and Section 521 is thus needed to protect national banks and state banks from potentially ruinous damages under state law.

The current uncertainty also presents a clear risk of substantial disruption to the nation's credit card payment systems, which are critical to the functioning of the nation's economy. At mid-year 1995, there were approximately 343.1 million VISA and MasterCard credit cards issued domestically, which accessed about 252.9 million accounts. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Annualizing data for the first six months of 1995, there were approximately 5.5 billion transactions on VISA and MasterCard credit cards issued in the United States alone, for an aggregate volume of $490.5 billion. *Id.*

In reliance on existing case law and the interpretations of the OCC and FDIC, Amici's members have established pricing for their credit card accounts based upon the understanding that federal law controls the permissibility of late fees. If the courts do not follow the federal agencies' guidance on this point, the pricing structures of Amici's members will be at risk, leaving those institutions in a potentially precarious state. In addition, new interpretations of the applicable law that governs late fees will force Amici's members to engage in costly and time-consuming changes to existing account pricing strategies and systems for servicing their credit card accounts. The uncertainty and resulting dislocation are likely to impact significantly the availability of credit on bank cards nationwide.

CONCLUSION

For the reasons set forth above, Amici strongly urge the Court to grant the petition for certiorari in this case.

Respectfully submitted,

SHIRLEY M. HUFSTEDLER
Counsel of Record
L. RICHARD FISCHER
JAMES A. HUIZINGA
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

Attorneys for Amici Curiae MasterCard International Incorporated and VISA U.S.A. Inc.

(6)

Supreme Court, U.S.
FILED
JAN 25 1996
CLERK

No. 95-951

In The

Supreme Court of the United States

October Term, 1995

LESLIE U. HARRIS, On Behalf Of Himself and All Others Similarly Situated,

Petitioner,

vs.

CHASE MANHATTAN BANK, N.A., and DOES 1 THROUGH 50,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILBERG WEISS BERSHAD HYNES & LERACH
LEONARD B. SIMON
Counsel of Record
ALAN MANSFIELD
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD HYNES & LERACH
KEVIN P. RODDY
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31

Petitioner, Leslie U. Harris, by counsel and pursuant to Rule 15.6, hereby files her Reply Brief in Support of her Petition for a Writ of Certiorari.

On January 19, 1996, this Court granted certiorari to review the decision of the Supreme Court of California in a related case, *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *review granted*, No. 95-860 (U.S. Jan. 19, 1996) ("*Smiley*"), to address whether the term "interest" in Section 85 of the National Bank Act ("NBA"), 12 U.S.C. §85 ("Section 85"), encompasses not only percentage-based periodic rates, but also flat late charges.

As Respondent, Chase Manhattan Bank, N.A. ("Chase"), correctly points out in its Brief in Support of Petition for a Writ of Certiorari ("Chase Brief"), this case – unlike *Smiley* or any of the other cases now pending before this Court – involves *both* Section 85 of the NBA *and* Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d ("Section 27"). *See* Chase Brief at 3-4. This critical point is also emphasized in *amicus curiae* briefs filed by the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, MasterCard International, Inc. and VISA U.S.A., Inc. in support of the Petition for a Writ of Certiorari in this case.

Therefore, Petitioner respectfully submits that this Court should also grant certiorari in this case, and combine it for briefing and oral argument with *Smiley*, in order to resolve the conflicts in the federal and state courts, *see* Chase Brief at 3-4 (collecting cases), and to

address the proper construction of the term "interest" in both Section 85 of the NBA and Section 27 of the FDIA.

DATED: January 24, 1996

LEONARD B. SIMON
Counsel of Record
ALAN M. MANSFIELD
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Attorneys for Petitioner